DOCKET

No. 07-544

Title:	Anthony Hedgpeth, Warden, Petitioner v. Michael Robert Pulido
Docketed:	October 24, 2007
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(05-15916, 05-16308)
Decision Date:	May 30, 2007
Rehearing Denied:	July 18, 2007

Questions Presented

---Date---	--------Proceedings and Orders----------
Oct 12 2007	Petition for a writ of certiorari filed. (Response due November 23, 2007)
Oct 12 2007	Appendix of Chris Chrones, Warden filed.
Nov 14 2007	Order extending time to file response to petition to and including December 26, 2007.
Dec 26 2007	Brief of respondent Michael Robert Pulido in opposition filed.
Dec 26 2007	Motion for leave to proceed in forma pauperis filed by respondent.
Jan 9 2008	DISTRIBUTED for Conference of February 15, 2008.
Jan 10 2008	Reply of petitioner Chris Chrones, Warden filed. (Distributed)
Feb 19 2008	DISTRIBUTED for Conference of February 22, 2008.
Feb 25 2008	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Feb 25 2008	Petition GRANTED.
Feb 29 2008	Motion to appoint counsel filed by respondent Michael Robert Pulido.
Mar 12 2008	Motion DISTRIBUTED for Conference of March 28, 2008.
Mar 17 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 12, 2008.
Mar 31 2008	Motion to appoint counsel filed by respondent GRANTED. J. Bradley O'Connell, Esquire, of San Francisco, California, is appointed to serve as counsel for the respondent in this case.
May 12 2008	Joint appendix filed. (Statement of costs filed)
May 12 2008	Brief of petitioner Chris Chrones, Warden filed.
May 19 2008	Brief amicus curiae of United States filed.
May 19 2008	Brief amicus curiae of Criminal Justice Legal Foundation filed.
May 30 2008	The time within which to file respondent's brief on the merits is extended to and including July 11, 2008.
Jun 9 2008	SET FOR ARGUMENT ON Wednesday, October 15, 2008.
Jul 3 2008	CIRCULATED

Jul 11 2008	Brief of respondent Michael Robert Pulido filed. (Distributed)
Jul 17 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 4 2008	Record received from the U.S.C.A. for the Ninth Circuit. (1 envelope)
Aug 7 2008	Record received from U.S. District Court for the Northern District of California. (2 boxes)
Aug 8 2008	Reply of petitioner Chris Chrones, Warden filed. (Distributed)
Sep 5 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 15 2008	Argued. For petitioner: Jeremy Friedlander, Deputy Attorney General, San Francisco, Cal.; and Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: J. Bradley O'Connell, San Francisco, Cal. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
OCT 12 2007
OFFICE OF THE CLERK

No. 07-544

IN THE SUPREME COURT OF THE UNITED STATES

CHRIS CHRONES, WARDEN, *Petitioner*,

v.

MICHAEL ROBERT PULIDO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
Fax: (415) 703-1234
Counsel for Petitioner

QUESTION PRESENTED

Stromberg v. *California*, 283 U.S. 359 (1931), required the reversal of the judgment if a general verdict could have rested on an instruction that defined a constitutionally defective alternative theory of criminal liability. However, a modern line of cases, including *Neder* v. *United States*, 527 U.S. 1 (1999), establishes that error in instructing on an element of a charged crime is not "structural error," so as to require automatic reversal, but is instead "trial error" and, as such, may be harmless.

The question presented is:

Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
THE NINTH CIRCUIT'S RULE THAT ALTERNATIVE LEGAL THEORY ERROR IS STRUCTURAL IS NOT BASED ON CLEARLY ESTABLISHED SUPREME COURT AUTHORITY AND CONFLICTS WITH THE LAW IN FOUR OTHER CIRCUITS.	11
A. The *Stromberg* Line Of Decisions Does Not Clearly Establish The Ninth Circuit's Rule That Alternative Legal Theory Error Is Structural.	12
B. The Ninth Circuit's Structural-Error Rule Conflicts With The Court's Modern Harmless-Error Jurisprudence.	14
C. The Ninth Circuit's Rule Conflicts With Decisions By Four Other Federal Circuit Courts.	19
D. The Error Was Harmless Under *Brecht*.	21
1. The Verdict Form And The Instructions Show Harmlessness.	21

TABLE OF CONTENTS (continued)

	Page
2. The Findings Of Reckless Indifference To Life And Major Participation In The Robbery Show Harmlessness.	22
CONCLUSION	24

TABLE OF AUTHORITIES

	Page
Cases	
Arizona v. *Fulminante* 499 U.S. 279 (1991)	14
Becht v. *United States* 403 F.3d 541 (8th Cir. 2005)	20
Brecht v. *Abrahamson* 507 U.S. 619 (1993)	*Passim*
Burks v. *United States* 437 U.S. 1 (1978)	13
California v. *Roy* 519 U.S. 2 (1996)	15, 16
Carella v. *California* 491 U.S. 263 (1989)	15
Chapman v. *California* 386 U.S. 18 (1967)	15, 16
Clark v. *Crosby* 335 F.3d 1303 (11th Cir. 2003)	14, 20
Estelle v. *McGuire* 502 U.S. 62 (1991)	15, 19
Evanchyk v. *Stewart* 340 F.3d 933 (9th Cir. 2003)	14
Fry v. *Pliler* ___U.S.___, 127 S.Ct. 2321 (2007)	2, 15, 19

TABLE OF AUTHORITIES (continued)

	Page
Goeke v. *Branch* 514 U.S. 115 (1995)	13
Graham v. *Collins* 506 U.S. 461 (1993)	17
Griffin v. *United States* 502 U.S. 46 (1991)	12, 14
Johnson v. *United States* 520 U.S. 461 (1997)	15
Keating v. *Hood* 191 F.3d 1053 (9th Cir. 1999)	11
Lara v. *Ryan* 455 F.3d 1080 (9th Cir. 2006)	9, 10, 12, 18, 19
Lockyer v. *Andrade* 538 U.S. 63 (2003)	11, 17
Mitchell v. *Esparza* 540 U.S. 12 (2003)	11
Neder v. *United States* 527 U.S. 1 (1999)	i, 2, 15-20
Parker v. *Secretary for Department of Corrections* 331 F.3d 764 (11th Cir. 2003)	21
People v. *Pulido* 15 Cal.4th 713, 936 P.2d 1235 (1997)	2
People v. *Pulido* 52 Cal. Rptr. 2d 373 (Ct. App. 1996)	6

TABLE OF AUTHORITIES (continued)

	Page
Pope v. *Illinois* 481 U.S. 497 (1987)	16, 20
Pulido v. *Chrones* 487 F.3d 669 (9th Cir. 2007)	2
Quigley v. *Vose* 834 F.2d 14 (1st Cir. 1987)	19, 20
Rose v. *Clark* 478 U.S. 570 (1986)	2, 14-17, 19, 20
Sandstrom v. *Montana* 442 U.S. 510 (1979)	12, 14, 15, 18
Stromberg v. *California* 283 U.S. 359 (1931)	*Passim*
Sullivan v. *Louisiana* 508 U.S. 275 (1993)	15
Teague v. *Lane* 489 U.S. 288 (1989)	17
United States v. *Holly* 488 F.3d 1298 (10th Cir. 2007)	13, 20
Williams v. *Taylor* 529 U. S. 362 (2000)	11, 17
Yarborough v. *Alvarado* 541 U.S. 652 (2004)	11
Yates v. *Evatt* 500 U.S. 391 (1991)	15

TABLE OF AUTHORITIES (continued)

	Page
Yates v. *United States* 354 U.S. 298 (1957)	13, 14, 20
Zant v. *Stephens* 462 U.S. 862 (1983)	13
Constitutional Provisions	
United States Constitution	
First Amendment	20
Eighth Amendment	17
Statutes	
Pub. L. No. 104-132, Title I, § 104 110 Stat. 1218 (1996)	3
United States Code	
Title 28, § 1254(1)	3
Title 28, § 2254	7
Title 28, § 2254(d)	i, 11
Title 28, § 2254(d)(1)	3
Court Rules	
Supreme Court Rule 13.3	3
Other Authorities	
Antiterrorism and Effective Death Penalty Act	11-13
California Jury Instructions, Criminal	
No. 8.80.1	21
No. 8.81.17	21

IN THE SUPREME COURT OF THE UNITED STATES

No.

CHRIS CHRONES, WARDEN, *Petitioner*,

v.

MICHAEL ROBERT PULIDO, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Chris Chrones, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Respondent was convicted of first-degree murder for the robbery-killing of a convenience store clerk. He claimed that a murder instruction allowed the jury to convict him as an accomplice even if he had aided in the robbery only after the killing. The California Supreme Court held any instructional error to be harmless because the jury, in also returning a separate "special circumstance" verdict, explicitly had found that respondent aided the robbery "during" the murder. Perceiving an ambiguity in another special-circumstance instruction, the Ninth Circuit rejected the state court's conclusion that the jury's special-circumstance finding had definitively cured the error in the murder instruction. Relying on circuit law it had derived from this Court's 1931 decision in *Stromberg* v. *California*, 283 U.S. 359 (1931), the Ninth Circuit

deemed the murder instruction to be "structural error" because it concerned an "alternative" theory of guilt—aiding and abetting, as opposed to direct perpetration—and held reversal was required because the court was not "absolutely certain" that the jury had not relied on the erroneous theory.

Stromberg concerned an instructional error qualitatively different from the error claimed here, so it is not "clearly established law" governing respondent's case. Instead—as four circuits have held—a line of cases stretching from *Rose* v. *Clark*, 478 U.S. 570 (1986), through *Neder* v. *United States*, 527 U.S. 1 (1999), clearly establishes that an erroneous instruction on an element of a crime is not "structural" and may be found harmless under traditional tests for prejudice. The Ninth Circuit's reaffirmation of its "structural error" rule in this case is particularly disturbing because it comes on the heels of this Court's holding just last Term in *Fry* v. *Pliler*, __ U.S. __, 127 S.Ct. 2321 (2007), that the relaxed harmless-error test of *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), applies in state-prisoner habeas corpus cases. Had it applied *Brecht's* test for actual prejudice instead of its own test of "absolute certainty," the Ninth Circuit would have been constrained to deny relief.

OPINIONS BELOW

The panel opinion of the court of appeal is reported at 487 F.3d 669. (App. to Pet. Cert. 1a.) The panel memorandum rejecting respondent's other habeas claims is unreported. (App. 25a.) The order denying rehearing and rehearing en banc is unreported. (App. 31a.) The orders of the district court are unreported. (App. 32a, 98a.) The opinion of the California Supreme Court is reported at 15 Cal. 4th 713, 936 P.2d 1235 (1997). (App. 101a.)

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2007. An order denying a petition for rehearing and rehearing

en banc was filed on July 18, 2007. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254(d)(1) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218 (1996).

STATEMENT OF THE CASE

1. The California Supreme Court summarized the events leading to respondent's conviction of first degree murder:

> Sometime between 1 a.m. and 5:30 a.m. on May 24, 1992, Ramon Flores, the cashier at a Shell gas station in San Mateo, was shot in the head with a single .45-caliber bullet, killing him within seconds. A neighbor heard a loud bang coming from the direction of the gas station around 3:45 a.m., then a voice yelling; he could not distinguish words, but told a police detective it sounded like the person was addressing someone else. A cash register taken from the store was found the next morning in some roadside bushes elsewhere in San Mateo. Defendant's fingerprints were on the cash register, as well as on an unopened can of Coke found on the store counter. No fingerprints of Michael Aragon, who defendant testified committed the killing, were identified on either the can or the register.
>
> Arrested on an unrelated auto theft charge, defendant volunteered that he had information about the Shell station robbery. He led police to a location where they found

discarded, unused .45-caliber cartridges, which bore ejection markings resembling those on a cartridge found on the gas station floor. Defendant made a series of inconsistent exculpatory statements to police, blaming the robbery and killing successively on a man named Carlos Vasquez, on a relative of defendant's named Eduardo Alarcon and, finally, on an unidentified Tongan man. In a telephone conversation from jail with his uncle, Michael Aragon, and Aragon's cohabitant, Laura Moore, however, defendant said he was alone during the robbery.

At the time of the killing, defendant was staying with Aragon, Moore and their children in their San Mateo home. While he was staying with them, Aragon, two of the children, and a neighbor saw defendant with a pistol, which the neighbor identified as a .45-caliber Colt. During that time, defendant twice observed that the nearby Shell station would be easy to rob because the attendant was always asleep. Aragon told defendant to get rid of the gun because he, Aragon, was on probation. He had been convicted in 1989 of burglary, possession of cocaine and contributing to the delinquency of a minor.

Aragon and Moore testified that defendant was at home when they went to bed around midnight on May 23, but was gone when they got up at around 3 a.m. to care for their baby. The next morning, Sunday, May 24, they awoke to find defendant asleep in the living room with his clothes and shoes on. He showed Aragon his wallet and said, "Look unc, almost all ones." Later that day, Moore discovered defendant was carrying a handgun and insisted he and Aragon dispose of it. At her direction, defendant took the gun apart; Moore then boiled the pieces in soapy water and put most of them in a bag, which defendant and Aragon threw away near Candlestick Park. Two pieces that Moore had retained to prevent reassembly were later given to police and identified as fitting a .45-caliber Colt.

After seeing a newspaper article about the killing, Aragon asked defendant if he committed it. Defendant denied he had, but a few days later, when Aragon asked again, defendant admitted the crime. He told Aragon he bought a Coke, then shot Flores in the face, took the register and later threw it in some bushes. In a letter from jail, however, defendant wrote to Moore, "If Michael is reading this, tell him I didn't kill that guy, I was just messing with him."

Defendant testified, blaming Aragon for the killing. Aragon, he stated, had seen where defendant kept the pistol. On the night of May 23, defendant and Aragon went out in Aragon's car; defendant thought the pistol was on the shelf where he usually kept it. They went to Hunters Point, where Aragon bought and smoked some cocaine. They left, but returned later for Aragon to buy and smoke more cocaine. Eventually the two arrived at the Shell station in San Mateo. Aragon went inside, defendant thought for matches or cigarettes. Defendant waited outside. He heard a gunshot and ran into the store. Aragon was holding defendant's gun. Flores was lying on the floor, bleeding from a large bullet wound in his face. Defendant yelled at his uncle, ran out of the store and got in the passenger seat of the car. A few seconds later, Aragon came out, holding the cash register in his left hand and the gun in his right hand. He threw the register on defendant's lap and drove away.

As they were driving away from the scene, Aragon told defendant to open the register. When defendant did not comply, Aragon pointed the gun at him and insisted. Defendant got a screwdriver from the back of the car and pried the register open. At Aragon's command defendant gave him the money and dumped the register in some bushes by the side of the road. Defendant denied touching a Coke can in the store that night; he suggested he might have touched the can on some earlier occasion when he

bought a drink at the store.

The defense also presented evidence casting doubt on Aragon's credibility. While admitting a prior drug possession conviction, Aragon denied he was still using cocaine at the time of the killing. However, Aragon's sister (defendant's aunt) testified he came to her house on Sunday, May 24 or Monday, May 25, at which time he was "on something," but did not smell of alcohol. Her son described Aragon as acting paranoid and smelling of crack cocaine. The sister opined Aragon was a liar and a thief. A police detective testified that, when first interviewed, Aragon said he had gotten up at 12:15 a.m. Sunday to take care of the baby. When Aragon and Moore were later interviewed together at the police station, both said it was around 3 a.m. During a discussion about the time period in which the killing occurred, Aragon said to Moore, "That's when I was with you, remember?"

The jury convicted defendant of robbery and first degree murder, and found true a robbery-murder special-circumstance allegation. ([Cal. Penal Code] §§ 211, 187, 189, 190.2, subd. (a)(17)(A).) The jury was unable to reach a verdict on allegations of personal gun use and personal infliction of great bodily injury. ([Cal. Penal Code] §§ 1203.075, 12022.5, subd. (a).) Defendant was sentenced to a life term without the possibility of parole.

The Court of Appeal affirmed the murder conviction and sentence. [*People* v. *Pulido*, 52 Cal. Rptr. 2d 373 (Ct. App. 1996) (officially depublished).] The court rejected defendant's contention . . . that the trial court should, sua sponte, have instructed the jury defendant was not liable for the murder if he formed the intent to aid and abet the robbery only after Flores was killed. The Court of Appeal reasoned that because one who intentionally assists a robber in the asportation of the stolen property is under [California law], guilty of robbery, and because a killing in

> the commission of robbery is first degree murder under section 189, "[i]t is unnecessary for the jury to determine whether the intent to aid and abet the underlying felony preceded the killing. . . ."

(App. 102a-105a.)

2. The California Supreme Court unanimously affirmed the judgment. (App. 120a.) Notwithstanding the lack of an instruction stating that the felony-murder rule does not apply to persons who aid and abet the felony only after the perpetrator kills, the court held that reversal was not required because "the omitted issue was resolved adversely to defendant under other, properly given instructions." (App. 102a.) It explained:

> [T]he jury was instructed that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery *at the time of the killing*. In a modified form of CALJIC No. 8.80.1 (1990 new) . . . the jury was directed to determine whether or not "the murder was committed *while the defendant was engaged or was an accomplice in*" robbery, attempted robbery or the immediate flight from robbery. (Italics added.) In the special circumstance verdict, consistent with this instruction, the jury found "that the said defendant, Michael Robert Pulido, engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission of crime charged in count 1* [murder]." (Italics added.) By its special circumstance verdict the jury thus found—explicitly, unanimously and necessarily—that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores.

(App. 116a.)

3. In November 1996, respondent sought federal habeas corpus relief under 28 U.S.C. § 2254. In March 2005, the district court granted the writ. (App. 32a, 97a.) It ruled that the state supreme court's harmless-error finding was "contrary to" and

an "unreasonable" application of "clearly established" Supreme Court precedent. (App. 52a-67a). The district court noted "confusion" in one of the special circumstance instructions. (App. 56a.) Because of a typographical error substituting "or" for "and," the instruction allowed a true finding of the special circumstance on either one of the following two predicate findings, rather than both: (1) "the murder was committed while the defendant was engaged in . . . the robbery"; (2) "the murder was committed in order to carry out . . . the . . . robbery. . . ." (App. 56a; see App. 8a.) Observing that the jury could have relied only on the latter prong of the instruction, the district court concluded that the special circumstance verdict did not necessarily prove that the jury found that respondent had joined the robbery before or during the killing. (App. 56a-57a.) According to the district court, the mistake in the instruction undermined the California Supreme Court's reliance on the special-circumstance instructions in reaching its conclusion that the error in the first-degree murder instructions was harmless. (App. 63a-64a.)[1/]

The district court rejected a further argument by the Warden. Noting that a separate special-circumstance instruction allowed the jurors to find respondent liable as an aider and abetter only if he intended to kill or acted with "reckless indifference to human life" and as a "major participant" in the robbery (App. 57a-58a), the Warden argued that the felony-murder instruction was harmless because the jury could not have found that respondent acted with reckless indifference to life and as a major participant in the robbery without believing that he aided

---

1. The parties and the federal district court treated the wording of the instruction as relevant only to the question of whether the claimed constitutional error in the felony-murder instruction was prejudicial. And respondent has never claimed that the typographical error in the special-circumstance instruction somehow rendered it unconstitutional, too. Such a claim would be unavailable to him now, for he never "fairly presented" it to the state supreme court and forfeited it under state procedural law.

the robbery before the killing. The district court disagreed. (App. 57a-59a.) Additionally, the district court viewed questions and answers between the jury and trial court during jury deliberations as an indication that the jury was uncertain whether respondent was guilty of felony murder if he aided and abetted the robbery only after the killing. (App. 59a-63a.) The district court noted that in finding the instructional error harmless the state supreme court did not weigh the evidence supporting the defense theory of only post-killing involvement. (App. 63a.) The district court concluded that the error in the felony-murder instruction had a substantial and injurious effect on the jury's verdict under the habeas corpus harmless-error rule of *Brecht* v. *Abrahamson*, 507 U.S. 619, 637. (App. 65a-67a.)

4. The Warden appealed to the Court of Appeals for the Ninth Circuit, which affirmed the grant of the writ in a published per curiam opinion with two concurring opinions. (App. 1a.) The court relied on *Lara* v. *Ryan*, 455 F.3d 1080 (9th Cir. 2006)—a derivative of *Stromberg* v. *California*, 238 U.S. 359 (1931)—for the proposition that "when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground[,] . . . the verdict may not stand when there is no way to determine its basis." *Lara* v. *Ryan*, 455 F.3d at 1085 (citations omitted). *Lara* said instructional error on an alternative theory of guilt is "structural," *id.* at 1086, but recognized a "limited exception" to the rule of automatic reversal: "reversal may not be required if 'it is *absolutely certain*' that the jury relied upon the legally correct theory to convict the defendant." *Id.* at 1085 (citations omitted.) Accepting respondent's argument that the error in the felony-murder instruction was structural under *Lara* (App. 11a), the circuit court found reversible error:

> Here, the jury instructions leave open the possibility that the jury convicted Pulido on a legally impermissible theory, namely, that the defendant joined the robbery only after Flores was killed. The typographical error in the

> contemporaneity instruction relied upon by the California Supreme Court introduces doubt into any inference to be drawn from the jury's finding as to the special circumstance. Because, unlike in *Lara*, we cannot be "absolutely certain" that the jury found that Pulido's crime of robbery was committed contemporaneously with the murder, the verdict must be reversed.

(App. 11a-12a (emphasis added).)

Judge O'Scannlain concurred in the judgment, stating that "*Lara's* attempt to distinguish instructions involving impermissible alternative theories from other instructional errors is logically unsustainable and inconsistent with Supreme Court precedent." (App. 15a.) "*Lara* should be overruled to correct our erroneous instructional error jurisprudence—if not by our court sitting en banc then, in due course, by the Supreme Court." (App. 15a.) Judge Thomas concurred in the majority's finding of structural error, added that the granting of the writ "would be the right result even under a harmless error standard," and disagreed "that *Lara* should be overruled." (App. 15a-16a.)

6. On July 18, 2007, the court of appeals denied the Warden's petition for rehearing and rehearing en banc. (App. 31a.) On July 30, 2007, the court granted the Warden's motion to stay the mandate.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S RULE THAT ALTERNATIVE LEGAL THEORY ERROR IS STRUCTURAL IS NOT BASED ON CLEARLY ESTABLISHED SUPREME COURT AUTHORITY AND CONFLICTS WITH THE LAW IN FOUR OTHER CIRCUITS.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas relief may be based only on "clearly established" law as determined by the Supreme Court. 28 U.S.C. § 2254(d). That standard is satisfied only by the holdings of this Court's cases, not mere dicta. *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Nor is it satisfied when the Court's holdings are "ambiguous," *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003), or "exhibit a lack of clarity," *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003). And it is not satisfied when a cited Supreme Court holding does not clearly apply in the context of the case at hand. See *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004).

In this case, the court of appeals overturned a conviction of first-degree murder by deeming an erroneous instruction on an alternative theory of guilt to be structural error. The court so held despite (1) manifest uncertainty whether any Supreme Court precedent has held that structural error occurs when an instruction presents an alternative theory of guilt that violates only state law; (2) a clearly established line of modern Supreme Court holdings that instructional error on an element of a crime is not structural error but instead is reviewed under traditional standards for harmlessness; (3) the court of appeals' own acknowledgment that "it is not readily apparent how to resolve the tension between" this Court's decisions in this area, *Keating* v. *Hood*, 191 F.3d 1053, 1064 n.17 (9th Cir. 1999); and (4) the fact that four other circuits analyze such error for harmlessness.

Certiorari is necessary to settle an important and recurring

issue concerning the availability of harmless error review for defective instructions on an alternative theory of criminal liability. Review is necessary also to ensure uniformity of decision by the federal circuit courts, to enforce AEDPA limitations on habeas corpus, and to confirm this Court's jurisprudence establishing that an erroneous instruction on the elements of a crime may be harmless.

A. The *Stromberg* Line Of Decisions Does Not Clearly Establish The Ninth Circuit's Rule That Alternative Legal Theory Error Is Structural.

The Ninth Circuit's structural error approach to alternative legal theory error derives primarily from *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979). See *Lara* v. *Ryan*, 455 F.3d at 1085. *Sandstrom* relied, in turn, on *Stromberg* v. *California*, 283 U.S. 359. *Sandstrom*, 442 U.S. at 526. *Stromberg* stated:

> As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the federal Constitution, the conviction cannot be upheld.

Stromberg v. *California*, 283 U.S. at 368.

In *Griffin* v. *United States*, 502 U.S. 46, 53 (1991), the Court observed that "[t]his language, and the holding of *Stromberg*, do

not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."

It is at best unclear whether *Stromberg* applies whenever an instruction presents a legally erroneous alternative theory, as the Ninth Circuit characterized the error here. *Stromberg* concerned a conviction that could have rested on an instruction that criminalized constitutionally protected speech. See *Stromberg*, 283 U.S. at 368-70. *Yates* v. *United States*, 354 U.S. 298 (1957), *overruled on other grounds by Burks* v. *United States*, 437 U.S. 1, 2 (1978), applied *Stromberg* to reverse a conviction based upon conduct post-dating a statutory time limit. However, *Yates* addressed a statutory, not a constitutional violation and, as such, was "an unexplained extension" of *Stromberg*. *Griffin* v. *United States*, 502 U.S. at 55-56; see *Zant* v. *Stephens*, 462 U.S. 862, 881-82 (1983) (finding cases under *Stromberg* include those where the verdict "may have rested exclusively on the insufficient ground," and those where the verdict "rested on *both* a constitutional and an unconstitutional ground"). *Yates* thus does not clearly establish a constitutional rule binding on the States, rather than a supervisory-power rule binding only on lower federal courts. Cf. *Goeke* v. *Branch*, 514 U.S. 115, 119 (1995) (per curiam) (distinguishing the Court's supervisory rules from constitutional rules applicable to states).

Were *Stromberg*, even as extended by *Yates*, to be deemed "clearly established" law for AEDPA purposes, its principle still would encompass only convictions for conduct that the State lacks the power to punish as crime. See *Stromberg*, 283 U.S. at 368 (characterizing the issue as whether any of the possible bases for conviction "could not constitute a lawful foundation for a criminal prosecution"); see also *United States* v. *Holly*, 488 F.3d 1298, 1306-07 n.3 (10th Cir. 2007) (distinguishing *Stromberg* as a rule "primarily confined to grounds for

conviction that are legally erroneous in their entirety"); *Evanchyk* v. *Stewart*, 340 F.3d 933, 941 n.2 (9th Cir. 2003) (distinguishing *Stromberg-Yates* because "[t]hose cases involved jury instructions for crimes based on facially invalid or legally impossible theories, or 'non-existent' crimes"); *Clark* v. *Crosby*, 335 F.3d 1303, 1310 (11th Cir. 2003) (holding, where conviction could have rested on finding of attempted felony murder, a non-crime under state law, *Stromberg-Yates* was not clearly established, given defendant did not contend "a conviction for attempted felony, as such, would violate the Constitution").

Moreover, *Griffin* indicates that *Stromberg* may define only a particular species of constitutional error, not a category of structural error. 502 U.S. at 53. Even *Sandstrom*, the case on which the Ninth Circuit relied in *Lara* to formulate its structural error rule, cited *Stromberg* only for the principle that the availability of a correct legal theory does not mean the jury used the correct theory, rather than an incorrect theory, as the basis for the verdict. *Sandstrom* v. *Montana*, 442 U.S. at 526. *Sandstrom* declined to consider whether the error in such a case would be harmless. *Id.* at 527. Review is required of the Ninth Circuit's notion that the *Stromberg* line of authority compels a finding of structural error whenever a trial court presents the jury with an erroneous alternative theory of guilt.

B. The Ninth Circuit's Structural-Error Rule Conflicts With The Court's Modern Harmless-Error Jurisprudence.

The Court's jurisprudence simply can no longer be said to clearly establish, if it ever did, that it is structural error to instruct erroneously on an alternative theory of guilt.

Arizona v. *Fulminante*, 499 U.S. 279, 306 (1991), the seminal case distinguishing structural error from trial error, made clear that most constitutional errors can be harmless. Indeed, *Rose* v. *Clark*, 478 U.S. 570, 579, already had established a "strong presumption" that constitutional violations at trial are subject

to harmless error analysis when the defendant had counsel and was tried by an impartial adjudicator. Under *Rose*, the Court consistently has viewed instructional error concerning an element of a crime to be subject to harmless-error review. *Neder* v. *United States*, 527 U.S. 1 (omission of element of materiality for fraud); *Johnson* v. *United States*, 520 U.S. 461 (1997) (omission of element of materiality for perjury); *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam) (omission of element of intent for aiding and abetting); *Yates* v. *Evatt*, 500 U.S. 391 (1991) (mandatory rebuttable presumption on element of malice), *overruled on another ground by Estelle* v. *McGuire*, 502 U.S. 62, 72 n.4 (1991)); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (mandatory conclusive presumption on element of intent); *Rose* v. *Clark*, 478 U.S. 570 (mandatory rebuttable presumption on element of malice).[2/] *Rose* specifically found that error of the type that occurred in *Sandstrom* can be harmless. 478 U.S. at 572, 580.

On direct review, the test for prejudice is whether the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). In a federal habeas corpus case, the harmless-error test is less stringent: the court determines whether the error "'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht* v. *Abrahamson*, 507 U.S. at 631; see *California* v. *Roy*, 519 U.S. at 5-6. *Brecht* applies to habeas corpus cases whether or not the state court tested the error for harmlessness under *Chapman*. *Fry* v. *Pliler*, __ U.S. __, 127 S. Ct. 2321, 2328.

In developing its *Rose* jurisprudence, the Court has not endorsed the Ninth Circuit's notion that a special test of prejudice ("absolutely certain") applies when an instruction can be characterized as a legally erroneous theory (alternative or

---

2. The sole exception is a defective reasonable doubt instruction, which "vitiates all the jury's findings." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993).

otherwise). *Rose* and its progeny do not articulate a standard of review for harmlessness more stringent than the reasonable-doubt standard of *Chapman*. And the Court has consistently rebuffed arguments that the issue of whether to perform harmless error review depends on how courts can characterize the particular instructional error at hand. See *Neder*, 527 U.S. at 11-13 (instructional error involving an element of the offense may be harmless regardless of whether the error is characterized as a "mandatory rebuttable presumption," "mandatory conclusive presumption," "misstatement of an element," "omission of an element," or failure to obtain a "complete verdict").

In *California* v. *Roy*, 519 U.S. at 5, the trial court erred by failing to include intent to aid as an element in its aiding and abetting instruction. *Roy* recognized that the error could with equal facility be called a misdescription of an element or an omitted element. *Id.* It did not matter: the error was subject to harmless error analysis. *Id.*

In *Pope* v. *Illinois*, 481 U.S. 497 (1987), the trial court should have instructed the jury to decide whether a reasonable person would find serious literary, artistic, political, or scientific value in allegedly obscene material. *Id.* at 500-01. Instead, the trial court told the jury to decide whether ordinary adults in the State of Illinois would view the material as obscene. *Id.* at 499. The instruction was unconstitutional because it allowed the jury to apply "a state community standard." *Id.* at 503. Although the instruction presented the jury with a legally erroneous theory, the Court held the error "comparable to" the one in *Rose* v. *Clark*. *Pope*, 481 U.S. at 502. As such, it was subject to harmless error analysis. *Id.* at 502-03.

Like *Stromberg*, but unlike *Rose*, the defective instruction in *Pope* allowed the jury to convict based on constitutionally protected conduct. Unlike *Stromberg*, and like *Rose*, *Pope* did not involve a legally erroneous alternative basis for finding an element of the crime. *Pope* found the defective instruction

indistinguishable from the one in *Rose* for purposes of harmless error analysis. The lesson is unmistakable: after *Rose*, an erroneous instruction on an element of the offense may be harmless regardless of whether the conviction might be based on conduct that the Constitution protects and regardless of whether the instruction can be characterized as an erroneous legal theory, alternative or otherwise.

At the very least, an unresolved conflict between the *Stromberg* and *Rose* line of cases demonstrates that the Ninth Circuit's structural-error rule is not clearly established. See *Lockyer* v. *Andrade*, 538 U.S. at 71-73 (no clearly established law where some Supreme Court cases had held that the Eighth Amendment does not apply to sentences in terms of years, some had upheld sentences, and one had found a lengthy sentence unconstitutional). See also *Williams* v. *Taylor*, 529 U.S. at 412 (stating "clearly established" standard is equivalent to an "old rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989), but determined by Supreme Court precedent); cf. *Graham* v. *Collins*, 506 U.S. 461, 467 (1993) (holding a rule is "new" under *Teague* unless reasonable jurists hearing the petitioner's claim at the time conviction became final would have felt compelled by existing precedent to rule in his favor).

The Ninth Circuit's structural-error rule conflicts in still other ways with this Court's recent harmless error jurisprudence. In *Neder*, the Court rejected the defendant's argument that instructional error affecting an element could be harmless only if, inter alia, other facts necessarily found by the jury were the "functional equivalent" of the omitted, misdescribed, or presumed element. The Court said the defendant's approach would "import into the initial structural-error determination (*i.e.*, whether an error is structural) a case-by-case approach that is more consistent with our traditional harmless-error inquiry (*i.e.*, whether an error is harmless). Under our cases, a constitutional error is either structural or it is not." *Neder*, 527 U.S. at 14.

The Ninth Circuit's rule suffers from the same "case-by-case" approach rejected in *Neder*. The Ninth Circuit's rule requires federal courts to distinguish instructions that present legally erroneous alternative theories from instructions that otherwise erroneously state elements of the charged offense. The former are deemed structural and require reversal unless a court is "absolutely certain" they are harmless; the latter are mere trial error and, as such, subject to traditional, more forgiving harmless error analysis. Thus, in deciding which errors to place in which category, courts must determine structural error with the case-by-case method *Neder* disapproved.

Of course, there is no assurance that any legitimate distinction could be found between the two types of errors. The Ninth Circuit merely assumes without explanation that alternative legal theory error is different from other erroneous instructions on elements of an offense. See *Lara* v. *Ryan*, 455 F.3d at 1086 ("[T]he trial court did not merely omit or misstate an element of the charged offense. Rather, its error was structural, because it enabled the jury to deliver a general verdict that potentially rested on different *theories of guilt*, at least one of which was constitutionally invalid." (Citation to *Sandstrom* omitted.)). Given the virtually limitless number of definitions of crimes and, by the same token, legal theories of criminal liability, there is virtually no limit to alternative legal theory error. The Ninth Circuit's insistence on this purported distinction among instructional errors presents an intractable, recurrent problem.

The *Lara* rule is doctrinally incoherent in two ways. First, *Lara* creates a unique form of structural error—one that may be harmless. Second, *Lara* conflates structural error with non-error. According to the Ninth Circuit, alternative legal theory error is structural, but harmless, if the jury did not actually rely on the legally erroneous theory. *Lara*, 455 F.3d at 1087. This principle runs afoul of the test for instructional error, which is whether a reasonable likelihood exists that the jury applied the

instruction in a way that violates the Constitution. See *Estelle* v. *McGuire*, 502 U.S. at 72. If an instruction misdescribes an alternative legal theory but the jury did not rely on the theory, no reasonable likelihood exists that the jury applied the instruction in a way that violates the Constitution, and thus no federal error exists. The Ninth Circuit's *Lara* rule has the remarkable dual capacity to make structural error out of non-constitutional error and to make harmless error out of structural error.

Perhaps most significantly, the Ninth Circuit's rule creates a potentially enormous exception to this Court's rule that a federal habeas court must analyze trial errors for harmlessness using the standard of *Brecht* v. *Abrahamson*, 507 U.S 619. *Fry* v. *Pliler*, __ U.S. at __, 127 S. Ct. at 2328. According to the circuit court, *Fry*'s command to apply *Brecht* disappears whenever a federal habeas court characterizes a defective instruction as a legally erroneous alternative theory and, as such, as "structural error." Because this method (or non-method) of finding supposedly structural error knows virtually no limits (as suggested above), it invites a wholesale negation of *Fry* whenever instructional error occurs.

C. The Ninth Circuit's Rule Conflicts With Decisions By Four Other Federal Circuit Courts.

Four circuits have held that the *Neder* approach trumps the *Stromberg* approach.

In *Quigley* v. *Vose*, 834 F.2d 14, 15 (1st Cir. 1987) (per curiam), the defendant contended that the trial court erred by "direct[ing] a mandatory conclusion as to intent (an essential element of the second degree murder charge) once certain predicate facts were found." To distinguish *Rose* v. *Clark*, 478 U.S. 579, which "clearly established that [such] a defect in the jury instructions does not 'automatically require reversal,'" the defendant in *Quigley* argued that *Stromberg*, not *Rose*,

governed. *Quigley*, 834 F.2d at 16. The circuit court disagreed, stating that "petitioner's assertion reduces to the strange claim that, because the jury here received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than in *Rose*—where the *only* charge on the critical issue was a mistaken one. That assertion cannot possibly be right, so it is plainly wrong." *Id.*

In *Becht* v. *United States*, 403 F.3d 541 (8th Cir. 2005), the defendant challenged his conviction for possessing child pornography because an instruction defined child pornography in a way later found to be unconstitutional under the First Amendment. *Id.* at 543-44. In considering harmless-error review, the Eighth Circuit found that *Rose* and not *Stromberg* controlled, placing particular reliance on *Pope*. *Id.* at 546-49. "*Stromberg* . . . establishes that there is 'error' in [a legally erroneous alternative theory] case; it does not speak to whether the error may be harmless." *Id.* at 548. "It would be anomalous to read *Stromberg* to preclude harmless-error review in Becht's case because the jury *also* was given the option to convict based on a constitutionally *valid* theory that Becht possessed images of actual children." *Id.*

In *United States v. Holly*, 488 F.3d 1298, the defendant was convicted of aggravated sexual abuse after the jury was instructed correctly on a "force" theory but incorrectly on a "fear" theory. *Id.* at 1299, 1302-04. Following *Neder* and *Rose* and distinguishing *Stromberg*, the Tenth Circuit decided the error was subject to a finding of harmlessness. *Id.* at 1304-11. It found *Stromberg* inapplicable because the instructional error in that case "'could not constitute a lawful foundation for a criminal prosecution.'" *Id.* at 1306-07.

In *Clark* v. *Crosby*, 335 F.3d at 1310, the defendant's conviction could have rested on a finding of attempted felony murder, a non-crime under state law. The Eleventh Circuit held that *Stromberg-Yates* was not clearly established Supreme Court precedent governing the question of harmless error, given that

the defendant did not contend that "a conviction for attempted felony murder, as such, would violate the Constitution." *Id.* See also *Parker* v. *Secretary for Department of Corrections*, 331 F.3d 764, 778 (11th Cir. 2003) ("*Stromberg* cannot foreclose harmless error review altogether, because an independent basis for a jury's verdict is not insufficient if the relevant error is, considered separately, harmless.").

All these decisions conflict with the Ninth Circuit's structural error rule. No other circuit has adopted its rule.

D. The Error Was Harmless Under *Brecht*.

The Ninth Circuit's adherence to *Stromberg* improperly determined the outcome of this case. Had the court applied *Brecht*, the outcome would have been different for at least two reasons.

1. The Verdict Form And The Instructions Show Harmlessness.

Because of the trial court's substitution of "or" for "and" in one of the special circumstance instructions (CALJIC No. 8.81.17), the jury had to make only one, rather than both, of the following findings to find the special circumstance true: "'1. The murder was committed while the defendant was engaged in . . . a robbery; *or* 2. The murder was committed in order to carry out or advance the . . . robbery or to facilitate the escape therefrom or to avoid detection. . . ." (App. 8a-9a, n.4.) The Ninth Circuit found that, "[p]aradoxical though it may seem" (App. 10a), the jury could have relied on the literal wording of the second prong and therefore could have failed to make the contemporaneity finding stated in the verdict form.

The interpretation of the special circumstance that the court of appeals attributed to the jury is not paradoxical. It is irrational. As the court of appeals acknowledged, the contemporaneity finding required for the special circumstance was stated both in the instruction (CALJIC No. 8.80.1) that

preceded the mistaken one and in the verdict form returned by the jury. (App. 9a; see App. 46a-47a, 55a.) During deliberations, the jury asked several questions about the law. (App. 59a-62a.) None of the inquiries suggests that the jury had trouble understanding the special-circumstance instructions. And nothing in the jury's questions or the court's responses remotely imply that the jury thought it could make a finding about respondent's participation in the robbery by finding something Aragon did alone. Neither of the parties suggested to the jury that it could adopt such an interpretation of the special-circumstance instructions. The only reasonable conclusion is that the jury interpreted the superficially problematic language in the instruction ("the murder was committed in order to carry out . . . the . . . robbery. . . .") to mean that respondent had to commit the murder in order to carry out the robbery.

2. The Findings Of Reckless Indifference To Life And Major Participation In The Robbery Show Harmlessness.

Respondent's defense was inconsistent with the jury's finding that he acted with "reckless indifference to human life" and aided the robbery as a "major participant." No jury would have concluded that an unarmed 16-year-old exhibited reckless indifference to human life merely by fleeing a homicide scene while the murderer stood by with a smoking gun. Nor would any jury have concluded that whatever minimal help respondent gave Aragon in the car amounted to major participation in the robbery. The uneventful getaway was of minimal importance compared to the actual killing and the removal of the cash register. The prosecutor never suggested in argument that the jury could find the special circumstance true based on respondent's actions after the killing.

The evidence of respondent's pre-killing participation was powerful. The murder weapon was his. His fingerprints were on the cash register and the drawer inside it. When speaking to

the police the day after the killing, respondent knew that Flores had been shot near the nose. Respondent led the police to where the unused bullets from the gun had been discarded. Other unused bullets were in respondent's car.

Most significantly, the police found respondent's thumb print on an unopened can of Coke on the counter inside the store. Respondent suggested that he could have touched the Coke can on a previous visit to the store. In closing argument to the jury, defense counsel disparaged that notion and speculated that respondent inadvertently touched the Coke can when he ran into the store after the shooting. Neither story explained how the Coke can got from the refrigerator case behind the cashier to the counter. Respondent himself provided the answer, in an unguarded moment a week after the killing. He told Aragon that he had bought a soda, left the store, returned, saw the cashier sleeping, asked him for another soda, then killed him. Thus, respondent's own words showed how respondent got Flores into position where he could be shot. Likewise, regardless of whether respondent or Aragon was the actual shooter, respondent's thumb print on the Coke can pointed heavily to his pre-killing involvement in the robbery.

In light of the evidence, the special-circumstance finding establishes that the jury believed that respondent aided and abetted the robbery before the killing. Likewise, the jury would have convicted respondent of first degree murder had it been given correct instructions on felony murder.

Under the *Brecht* standard, the instructional error did not have a substantial and injurious effect or influence on the jury's verdict. Accordingly, the Ninth Circuit's "absolute certainty" rule of harmlessness led to an unwarranted grant of the writ of habeas corpus.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 19, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JF:er
SF2007402455
20109891.wpd

APPENDIX

71

(1)

Supreme Court, U.S
FILED

NO. 07-544 OCT 12 2007

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHRIS CHRONES, WARDEN, *Petitioner*,

v.

MICHAEL ROBERT PULIDO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
Fax: (415) 703-1234
Counsel for Petitioner

APPENDIX INDEX

	Page
Published Opinion by Ninth Circuit Court of Appeals, filed May 30, 2007.	1a
Memorandum Unpublished Opinion by Ninth Circuit Court of Appeals, filed May 30, 2007	25a
Order Denying Rehearing and Rehearing En Banc by Ninth Circuit Court of Appeals, filed July 18, 2007.	31a
Order Granting Petition for a Writ of Habeas Corpus by United States District Court for the Northern District of California, filed March 24, 2005.	32a
Order Denying Motion to Alter Judgment by United States District Court for the Northern District of California, filed April 21, 2005.	98a
Published Opinion by the California Supreme Court, filed May 29, 1997.	101a

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Michael Robert PULIDO, Petitioner-Appellee, v. Chris CHRONES, Warden, Respondent-Appellant./	No. 05-15916 D.C. No. CV-99-04933-CW
Michael Robert Pulido, Petitioner-Appellant, v. Chris Chrones, Warden, Respondent-Appellee./	No. 05-16308 D.C. No. CV-99-04933-CW OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
June 13, 2006
Submission withdrawn August 1, 2006
Resubmitted May 30, 2007
San Francisco, California

Filed May 30, 2007

Before: Alfred T. Goodwin, Diarmuid F. O'Scannlain, and
Sidney R. Thomas, Circuit Judges.

Per Curiam Opinion;
Concurrence by Judge O'Scannlain;
Concurrence by Judge Thomas

COUNSEL

Jeremy Friedlander, Deputy Attorney General, San Francisco, CA, argued the cause for the respondent-appellant. Bill Lockyer, Attorney General of the State of California; Robert R. Anderson, Chief Assistant Attorney General; Gerald A. Engler, Senior Assistant Attorney General; and Peggy S. Ruffra, Supervising Deputy Attorney General were on the briefs.

J. Bradley O'Connell, San Francisco, CA, argued the cause for the petitioner-appellee and was on the brief.

OPINION

PER CURIAM:

We must consider whether a state court erred in affirming a conviction for murder.

I

Michael Pulido was tried and convicted for his role in the robbery of a Shell gasoline station in San Mateo, California and the murder of an employee. He claims that the California Supreme Court wrongly affirmed his conviction.

A

Because Pulido's claims are fact-intensive, we consider the facts-as presented by the California Supreme Court in its opinion affirming Pulido's conviction-in some detail:

> Sometime between 1 a.m. and 5:30 a.m. on May 24, 1992, Ramon Flores, the cashier at a Shell gas station in San Mateo, was shot in the head with a single .45-caliber bullet, killing him within seconds. A neighbor heard a loud bang coming from the direction of the gas station around 3:45 a.m., then a voice yelling; he could not distinguish words, but told a police detective it sounded like the person was addressing someone else. A cash register taken from

the store was found the next morning in some roadside bushes elsewhere in San Mateo. Defendant's fingerprints were on the cash register, as well as on an unopened can of Coke found on the store counter. No fingerprints of Michael Aragon, who defendant testified committed the killing, were identified on either the can or the register.

Arrested on an unrelated auto theft charge, defendant volunteered that he had information about the Shell station robbery. He led police to a location where they found discarded, unused .45-caliber cartridges, which bore ejection markings resembling those on a cartridge found on the gas station floor. Defendant made a series of inconsistent exculpatory statements to police, blaming the robbery and killing successively on a man named Carlos Vasquez, on a relative of defendant's named Eduardo Alarcon and, finally, on an unidentified Tongan man. In a telephone conversation from jail with his uncle, Michael Aragon, and Aragon's cohabitant, Laura Moore, however, defendant said he was alone during the robbery.

At the time of the killing, defendant was staying with Aragon, Moore and their children in their San Mateo home. While he was staying with them, Aragon, two of the children, and a neighbor saw defendant with a pistol, which the neighbor identified as a .45-caliber Colt. During that time, defendant twice observed that the nearby Shell station would be easy to rob because the attendant was always asleep. Aragon told defendant to get rid of the gun because he, Aragon, was on probation. He had been convicted in 1989 of burglary, possession of cocaine and contributing to the delinquency of a minor.

Aragon and Moore testified that defendant was at home when they went to bed around midnight on May 23, but was gone when they got up at around 3 a.m. to care for their baby. The next morning, Sunday, May 24, they awoke to find defendant asleep in the living room with his clothes and shoes on. He showed Aragon his wallet and said, "Look unc, almost all ones." Later that day, Moore discovered defendant was carrying a handgun and insisted he and Aragon dispose of it. At her direction, defendant took the

gun apart; Moore then boiled the pieces in soapy water and put most of them in a bag, which defendant and Aragon threw away near Candlestick Park. Two pieces that Moore had retained to prevent reassembly were later given to police and identified as fitting a .45-caliber Colt.

After seeing a newspaper article about the killing, Aragon asked defendant if he committed it. Defendant denied he had, but a few days later, when Aragon asked again, defendant admitted the crime. He told Aragon he bought a Coke, then shot Flores in the face, took the register and later threw it in some bushes. In a letter from jail, however, defendant wrote to Moore, "If Michael is reading this, tell him I didn't kill that guy, I was just messing with him."

Defendant testified, blaming Aragon for the killing. Aragon, he stated, had seen where defendant kept the pistol. On the night of May 23, defendant and Aragon went out in Aragon's car; defendant thought the pistol was on the shelf where he usually kept it. They went to Hunters Point, where Aragon bought and smoked some cocaine. They left, but returned later for Aragon to buy and smoke more cocaine. Eventually the two arrived at the Shell station in San Mateo. Aragon went inside, defendant thought for matches or cigarettes. Defendant waited outside. He heard a gunshot and ran into the store. Aragon was holding defendant's gun. Flores was lying on the floor, bleeding from a large bullet wound in his face. Defendant yelled at his uncle, ran out of the store and got in the passenger seat of the car. A few seconds later, Aragon came out, holding the cash register in his left hand and the gun in his right hand. He threw the register on defendant's lap and drove away.

As they were driving away from the scene, Aragon told defendant to open the register. When defendant did not comply, Aragon pointed the gun at him and insisted. Defendant got a screwdriver from the back of the car and pried the register open. At Aragon's command defendant gave him the money and dumped the register in some bushes by the side of the road. Defendant denied touching

a Coke can in the store that night; he suggested he might have touched the can on some earlier occasion when he bought a drink at the store.

The defense also presented evidence casting doubt on Aragon's credibility. While admitting a prior drug possession conviction, Aragon denied he was still using cocaine at the time of the killing. However, Aragon's sister (defendant's aunt) testified he came to her house on Sunday, May 24 or Monday, May 25, at which time he was "on something," but did not smell of alcohol. Her son described Aragon as acting paranoid and smelling of crack cocaine. The sister opined Aragon was a liar and a thief. A police detective testified that, when first interviewed, Aragon said he had gotten up at 12:15 a.m. Sunday to take care of the baby. When Aragon and Moore were later interviewed together at the police station, both said it was around 3 a.m. During a discussion about the time period in which the killing occurred, Aragon said to Moore, "That's when I was with you, remember?"

People v. Pulido, 936 P.2d 1235, 1237-38 (1997).

B

On July 2, 1993, a jury convicted Pulido of first degree murder, robbery, receiving stolen property, and auto theft. The jury also returned a special circumstance finding of robbery felony-murder, under Cal. Penal Code § 190.2(a)(17)(I). The jurors deadlocked on allegations that Pulido personally used a firearm and personally inflicted great bodily injury as defined by Cal. Pen. Code §§ 12022.5(a), 1203.075. Thus, we will assume for the purposes of our analysis that Pulido did not personally murder Flores.

The trial court sentenced Pulido to life without the possibility of parole for murder with special circumstances. *See* Cal. Pen. Code § 190.5(b). The California Court of Appeal affirmed the murder conviction, *People v. Pulido,* 52 Cal.Rptr.2d 373 (Ct.App.1996), as did the California Supreme Court, *Pulido,* 936 P.2d 1235.

After filing various habeas petitions in the California superior court and California Court of Appeal, Pulido filed a pro se habeas petition with the California Supreme Court, which that court summarily denied on July 28, 1999. Pulido then filed the present petition in the federal district court on November 16, 1999. The district court granted Pulido's petition on the grounds of prejudicial instructional error. The district court rejected Pulido's remaining claims, but granted a partial certificate of appealability ("COA") on four of these.

The State of California timely appealed the grant of the petition, and Pulido timely cross-appealed the denial of his petition on the four remaining grounds.[1]

II

Pulido asserts that the trial court's erroneous jury instructions constituted prejudicial constitutional error and that the state court decision affirming his conviction was both contrary to and an unreasonable application of clearly established federal law.[2] More specifically, Pulido claims that

---

1. In a concurrently filed memorandum disposition, we affirm the district court's denial of Pulido's petition as to these issues. *See Pulido v. Chrones*, Nos. 05-15916 & 05-16308 (**filed May 30, 2007**)."

2. Because Pulido filed his habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this case. The district court's decision to grant or to deny a habeas petition is reviewed de novo. *Benn v. Lambert*, 283 F.3d 1040, 1051 (9th Cir.2002).

AEDPA limits habeas relief to situations in which the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." 28 U.S.C. §§ 2254(d)(1); *see Williams v. Taylor*, 529 U.S. 362, 407-09 (2000). The burden of proof rests with the petitioner, *see Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam), and for each claim, we analyze the last-reasoned state court opinion, *see Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

A state court decision is "contrary to" clearly established federal law if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law. *See Williams*, 529 U.S. at 405-06. The state court would also render a decision contrary to "clearly established Federal

because of multiple instructional errors, the jury could have convicted him of felony-murder under an invalid legal theory: felony-murder solely on the basis of post-murder involvement in the robbery, for there was no contemporaneity finding linking Pulido to *pre*-murder involvement in the robbery.[3] The State responds that the California courts reasonably affirmed the verdict because the jury's special circumstance finding incorporated a contemporaneity finding.

A

The jury instructions in this case covered murder (California Jury Instructions, Criminal ("CALJIC") 8.21), aiding and abetting, (CALJIC 8.27 and CALJIC 9.40.1), robbery-murder special circumstances (CALJIC 8.80.1, CALJIC 8.81.17, CALJIC 8.83, and CALJIC 8.83.1), robbery (CALJIC 9.40), and felony-murder (CALJIC 9.44, CALJIC 3.00, and CALJIC 3.01).

---

law" if it "confront[ed] a set of facts that are materially indisting uishable from a decision of [the Supreme] Court and nevertheless arrive[d] at a result different from [its] precedent." *Id.* at 406.

A state court's decision involves an "unreasonable application" of federal law if it (1) "correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable," or (2) "extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir.2002). To warrant habeas relief, "[t]he state court's application of clearly established law must be objectively unreasonable," not merely incorrect. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (citing *Williams*, 529 U.S. at 409, 411). Even the federal court's "firm conviction" that the decision was "erroneous" is an insufficient basis on which to grant relief. *Id.* at 75 (citation omitted).

3. In evaluating an allegedly erroneous jury instruction, we first determine whether the error, if any, amounted to constitutional error. *See Morris v. Woodford*, 273 F.3d 826, 833 (9th Cir.2001). If there is constitutional error, we consider whether the error was harmless; that is, whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

The State concedes that two of these instructions were defective.

[1] First, the felony-murder instructions were defective because, in *Pulido,* the California Supreme Court held that aiding and abetting a robbery *after* the killing of a victim does not constitute felony-murder under California law. *See* 63 Cal.Rptr.2d 625, 936 P.2d at 1238-43; *id.* at 1243 (refusing to extend the "felony-murder rule to include aiders and abettors or conspirators who join the felonious enterprise only after the murder has been completed."). Because the felony-murder instructions presented to the jury allowed conviction on the basis of after-the-murder robbery involvement, the felony-murder instructions are invalid and are insufficient to support the conviction, which requires a finding of contemporaneity under California criminal law. *See id.* at 1243-44.

[2] Second, the State concedes that one of the murder-robbery special circumstance instructions was invalid. The district court discovered a typographic error: the jury instructions substituted "or" for "and" in CALJIC 8.81.17, erroneously enlarging the scope of activity that would qualify as murder-robbery under the special circumstance.[4]

---

4. CALJIC 8.81.17, as delivered to the jury, reads:

To find that the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved:

> 1. The murder was committed while the defendant was engaged in the commission or attempted commission or a robbery; *or*
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder.

B

The California Supreme Court concluded that any instructional error was harmless because the special circumstance verdict required the jury to make the necessary contemporaneity determination:

> [D]efendant cannot demonstrate prejudice from the asserted instructional error: "[T]he factual question posed by the omitted instruction was necessarily resolved adversely to defendant under other, properly given instructions." (*People v. Sedeno*, [518 P.2d 913, 924 (Cal. 1974)]) Specifically, the jury was instructed that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery *at the time of the killing*. In a modified form of No. 8.80.1 . . . the jury was directed to determine whether or not "the murder was committed *while the defendant was engaged or was an accomplice in* " robbery, attempted robbery or the immediate flight from a robbery. (Italics added.) In the special circumstance verdict, consistent with this instruction, the jury found "that the said defendant, Michael Robert Pulido, engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission of crime charged in count 1* [murder]." (italics added.) By its special circumstance verdict the jury thus found-explicitly, unanimously and necessarily-that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores.
>
> Defendant argues the special circumstance finding is not dispositive because, under another portion of CALJIC No. 8.80.1, the jury could have based its finding on defendant's being a "major participant" in the robbery and acting with "reckless indifference to human life." Such a finding, defendant asserts, could in turn have rested on defendant's assisting Aragon after the killing instead of seeking help for Flores. We disagree. Postkilling assistance to Aragon, by

---

(emphasis added to show typographical error; the "or" should read "and").

> itself, could not have been the basis for the jury's explicit finding defendant "engaged in or was an accomplice in the commission of or attempted commission of robbery *during* the commission of [murder]," nor could it have satisfied the instructional requirement that "the murder was committed *while* the defendant was engaged or was an accomplice in" robbery. (Italics added.) The special circumstance finding thus demonstrates the jury did not accept the theory defendant joined the robbery only after Flores was killed. Any error in the failure specially to instruct on this issue was harmless.
>
> For the same reason, no prejudice could have arisen from the instructions actually given on duration of robbery and liability of accomplices for first degree felony murder. Defendant contends these instructions permitted the jury to convict him of murder on the legally inadequate ground that he assisted Aragon in taking away the robbery loot. An instructional error presenting the jury with a legally invalid theory of guilt does not require reversal, however, if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory. (*People v. Guiton,* [847 P.2d 45, 53 (Cal.1997)].) As shown above, the jury's true finding on the robbery-murder special circumstance so demonstrates.

Pulido, 936 P.2d at 1243-44 (emphasis in state court opinion).

As the foregoing discussion demonstrates, however, and as the State now concedes, the special circumstance instruction erroneously used the word "or" rather than "and" in joining the contemporaneity prong to the "committed in order to carry out or advance the commission of the crime" prong. Paradoxical though it may seem, the erroneous explanation in CALJIC 8.81.17 permitted the jury to find the special circumstance that the murder was committed "while the defendant was engaged in or was an accomplice in" robbery without in fact finding that the acts were contemporaneous. This is so because the jury was instructed that if it merely found that the murder was committed "in order to carry out or advance" the robbery, it

should find that the special circumstance was satisfied. Nowhere was this erroneous description of the requirements for finding the special circumstance corrected. Thus, the California Supreme Court's conclusion that the jury "necessarily" found the defendant guilty on a proper theory does not follow.

C

[3] Pulido urges, and the district court agreed, that the California Supreme Court decision was contrary to federal law because it improperly applied harmless error analysis. In particular, Pulido contends that under our court's recent decision in *Lara v. Ryan,* 455 F.3d 1080 (9th Cir.2006) (decided subsequent to the district court proceedings in this case), the instructional error was structural and therefore not subject to harmless error review. In *Lara,* the defendant was convicted of attempted murder after the jury had been instructed that it could convict him under a theory of express malice or an implied malice theory, the second of which was legally improper. 455 F.3d at 1082. Relying primarily on the Supreme Court's decision in *Sandstrom v. Montana,* 442 U.S. 510 (1979), and this court's decision in *Keating v. Hood,* 191 F.3d 1053 (9th Cir.1999), we held that such error was structural and that "where a reviewing court cannot determine with absolute certainty whether a defendant was convicted under an erroneous theory" reversal is required. *Lara,* 455 F.3d at 1086. We concluded that because the jury had made a specific finding that Lara had attempted to murder willfully, deliberately, and with premeditation it was absolutely certain that the jury had not convicted on the improper implied-malice theory.

[4] Here, the jury instructions leave open the possibility that the jury convicted Pulido on a legally impermissible theory, namely, that the defendant joined the robbery only after Flores was killed. The typographical error in the contemporaneity instruction relied upon by the California Supreme Court introduces doubt into any inference to be drawn from the jury's finding as to the special circumstance. Because, unlike in *Lara,* we cannot be "absolutely certain" that the jury found that Pulido's crime of robbery was committed contemporaneously

with the murder, the verdict must be reversed.

D

Because Pulido's conviction must be reversed under *Lara*'s absolute certainty standard, we need not consider his alternative claims for relief.

III

For the foregoing reasons, the decision of the district court is AFFIRMED.

O'SCANNLAIN, Circuit Judge, concurring specially:

I agree with the majority that our recent decision in *Lara v. Ryan,* 455 F.3d 1080 (9th Cir.2006), compels us to affirm the district court's grant of habeas relief. I write separately, however, because I believe this circuit's instructional error jurisprudence cries out for review, preferably by our court sitting en banc, or if not, by the Supreme Court.

I

In *Lara,* we rejected the state's argument that instructional errors of the sort at stake in this case (involving the possibility of conviction on legally impermissible grounds) should be reviewed for harmless error under the standard set forth in *Chapman v. California,* 386 U.S. 18 (1967). *Lara,* 455 F.3d at 1086. *Chapman* stands for the principle that a federal constitutional error may be held harmless if a court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman,* 386 U.S. at 24. Instead, purportedly relying on *Sandstrom v. Montana,* 442 U.S. 510 (1979), we held in *Lara* that because the error at stake "enabled the jury to deliver a general verdict that potentially rested on different *theories of guilt,* at least one of which was constitutionally invalid," the error must have been "structural" and not subject to harmless error review. *Lara,* 455 F.3d at 1086.

It is true that *Sandstrom* held that a state trial court committed federal constitutional error by instructing a jury with a rebuttable, burden-shifting presumption on an element of the offense, even though it was not certain that the jury had relied upon the burden-shifting instruction at issue. *Sandstrom,* 442 U.S. at 526. The Supreme Court in *Sandstrom* went on to cite a much earlier case, *Stromberg v. California,* 283 U.S. 359, to the effect that where a case is submitted to the jury on alternative theories, the unconstitutionality of one of the theories requires that the verdict be set aside. *Sandstrom,* 442 U.S. at 526. But *Lara*'s reliance on *Sandstrom* as leading to the rejection of harmless error review for *Sandstrom* errors is dubious at best, inasmuch as *Sandstrom* itself specifically reserved judgment on that very question, however decisive its citation of *Stromberg* may seem. *Sandstrom,* 442 U.S. at 526-27.[1] Moreover, the distinction between structural errors and trial errors relied upon in *Lara* is patently illogical.

Lara rightly recognizes that we review instructions that omitted elements of offenses for harmless error. *Lara,* 455 F.3d at 1086. *Lara* describes such trial errors as "simply" omitting or "merely" omitting elements from instructions, and contrasts them with the allegedly more serious error of placing before the jury one correct and one incorrect instruction. *Id.* But these uses of "simply" and "merely" represent nothing more than rhetorical legerdemain: for the result of element-omitting instructions is of course that the *only* theory placed before the jury is constitutionally defective. And yet, as we recognized in *Lara,* such errors are subject to harmless error review. Thus, we implicitly decided in *Lara* that a jury instruction adding a legally permissible theory to a legally impermissible one somehow *increases* the gravity of the error.

---

1. In fairness, *Lara* claims also to be relying upon this court's elaborations of the *Sandstrom* opinion, especially our decision in *Keating v. Hood,* 191 F.3d 1053 (9th Cir.1999). *Lara,* 455 F.3d at 1086. Indeed, *Keating* is quoted for the "absolute certainty" standard applied in *Lara. Id.* at 1085. Nevertheless, as will be shown below, citations to our own confused circuit law in this area cannot overcome the Supreme Court's own clear rejection of the structural error analysis adopted in *Lara.*

If logic is not enough to demonstrate our mistake in *Lara*, then Supreme Court text ought to be. In *Rose v. Clark*, 478 U.S. 570 (1986), the Court clearly indicated its answer to the question it had held in abeyance in *Sandstrom*, whether harmless error review is properly applied to *Sandstrom* errors:

> We agree that the determination of guilt or innocence . . . is for the jury rather than the court. . . . Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome? This question applies not merely to *Sandstrom* violations, but to other errors that may have affected either the instructions the jury heard or the record it considered-including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of defendant's cross-examination of a prosecution witness. All of these errors alter the terms under which the jury considered the defendant's guilt or innocence, and therefore all theoretically impair the defendant's interest in having a jury decide his case. The dissent's argument-that the Sixth Amendment forbids a reviewing court to decide the impact of a trial error on the outcome . . . logically implies that all such errors are immune from harmless error analysis. Yet this court has repeatedly held to the contrary. . . . Indeed, *Chapman*, the beginning of this line of cases, applied harmless-error analysis to an error that placed an improper argument before the jury. . . . These decisions, ignored by the dissent, strongly support the application of harmless-error analysis in the context of *Sandstrom* error.

Rose, 478 U.S. at 582, n. 11 (citations omitted). Even though *Rose* did not squarely address the precise error at stake here and in *Lara*, the logic of the opinion, as demonstrated by the passage quoted, is unmistakable.

For this reason, shortly after *Rose*, the First Circuit rejected the same logic we embraced more than twenty years

later in *Lara:*

> Once the camouflage is stripped away, petitioner's assertion reduces to the strange claim that, because the jury here received both a "good" charge and a "bad" charge on the issue, the error was somehow more pernicious than in *Rose*-where the *only* charge on the critical issue was a mistaken one. That assertion cannot possibly be right, so it is plainly wrong.

Quigley v. Vose, 834 F.2d 14, 16 (1st Cir.1987) (per curiam). Our decision in *Lara* fails to note either *Rose* or *Quigley,* let alone to distinguish them.

II

As the foregoing discussion makes clear, *Lara*'s attempt to distinguish instructional errors involving impermissible alternative theories from any other instructional errors is logically unsustainable and inconsistent with Supreme Court precedent. Our reliance upon signaling words such as "merely" and "simply" to describe serious constitutional errors such as those at stake in *Chapman* serves, indeed, only to camouflage the underlying reality and to create a distinction where there is no difference-as if by playing with names, the scent of *Rose* might be altered. I believe that *Lara* should be overruled to correct our erroneous instructional error jurisprudence-if not by our court sitting en banc then, in due course, by the Supreme Court. Until that happens, I have no alternative but to concur in the opinion of the court.

THOMAS, Circuit Judge, concurring.

Although I agree with the majority opinion that *Lara v. Ryan,* 455 F.3d 1080 (9th Cir.2006), requires us to treat the instructional error at issue here as a structural error, I write separately to emphasize that the result the majority reaches would be the right result even under a harmless error standard. I also write to express my respectful disagreement with the conclusion of my concurring colleague that *Lara* should be

overruled.

I

Under the harmless error standard, the government bears the burden of demonstrating that the alleged error could not have affected the outcome. *Chapman v. California,* 386 U.S. 18, 23-24 (1967). Specifically, the government must show that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States,* 527 U.S. 1, 18 (1999).

When applying the harmless error standard in a case of instructional error, the court must evaluate the record as a whole. *Id.* at 19 ("Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record."). Although it might be possible to conclude that an individual verdict form was sufficiently clear to cure an instructional error, the relevant question must not be so limited. Rather, the court must determine whether the entire record, including not just curative instructions but all aspects of the jury's deliberative process, undoubtedly demonstrates that a rational jury would have convicted the defendant even if the error had not been made. In other words, as the Supreme Court has specifically held, "a single instruction to the jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Middleton v. McNeil,* 541 U.S. 433, 437 (2004) (quoting *Boyde v. California,* 494 U.S. 370, 378 (1990)).

II

The government offers two theories for finding that the instructional error was harmless-or at least for finding that the California Supreme Court did not unreasonably apply *Chapman v. California,* 386 U.S. 18 (1967), when it concluded that the error was harmless.

First, the government points out that one of the three special circumstance robbery-murder instructions, CALJIC 8.80.1, required the jury to find that "the murder was

committed *while* the defendant was engaged in or was an accomplice in . . . robbery." The state Supreme Court concluded and the government now contends that that instruction sufficiently cured any confusion arising from the flawed felony-murder instruction and from the typographical error in CALJIC 8.81.17 because it clearly required contemporaneity between the murder and the defendant's involvement in the robbery.

Second, the government points out that the jury's verdict form for special circumstance robbery-murder specified that Pulido "engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission* of the crime charged in Count 1 [murder]." According to both the California Supreme Court and the government, that language on the verdict form demonstrates that the jury found "explicitly, unanimously and necessarily [ ] that defendant's involvement in the robbery . . . commenced before or during the killing of Flores." *People v. Pulido,* 936 P.2d 1235, 1243-44 (Cal. 1997).

As should be apparent, both of the government's theories rely on isolated documents; in fact, both theories rely on isolated quotations found within isolated documents. The government argues that those isolated quotations sufficiently demonstrate the jury's understanding of and reliance on contemporaneity. But the government's and the California Supreme Court's analysis of isolated documents, as noted in the first part of this opinion, does not suffice under *Chapman* and *Neder* to prove harmlessness beyond a reasonable doubt. Instead, the California Supreme Court and this court are required to review the entire record to determine whether the error caused harm. Our conclusion cannot rest on a verdict form and an allegedly curative instruction taken in isolation; it must include a careful review of the entire record to determine whether the government's interpretation of isolated documents is consistent with other evidence of the jury's probable and actual thinking.

III

Once the entire record is considered in this case, it becomes apparent that the supposedly curative instruction actually

aggravated, rather than curing, the instructional error. Furthermore, the entire record reveals that the multiple instructional errors at issue in this case had great potential to-and did in fact-cause jury confusion. As a result, one cannot conclude beyond a reasonable doubt that the flawed instructions were irrelevant to the outcome.

A

First, the portion of CALJIC 8.80.1 that supposedly cured the errors is an extremely small portion of that instruction; the instruction as a whole, particularly when read together with other instructions given, actually aggravates the errors in the felony-murder instructions and the special circumstance instruction, CALJIC 8.81.17.

The allegedly curative language is contained solely in the legal formulation of the special circumstance, which states that the special circumstance is true if "the murder was committed *while* the defendant was engaged in or was an accomplice to . . . robbery." The same instruction, however, later clarifies the standards for finding the special circumstance under various factual scenarios. Most importantly for purposes of this case, the instruction provides special standards for cases in which the "defendant was not the actual killer of a human being" or in which the jury is "unable to decide whether the defendant was the actual killer[.]" CALJIC 8.80.1, at 2. That is, the instruction lays out special guidelines for convicting a non-triggerman of the special circumstance.

Because the jury hung on the question of whether Pulido used a gun, we must assume that the jury's special circumstance finding relied on those specific standards for non-triggermen. In other words, because we know that the jury could not decide whether Pulido was the triggerman and because we must assume that the jury followed all instructions, we must also assume that the jury followed the special circumstance guidelines that apply when a jury is "unable to decide whether the defendant was the actual killer."

In turn, those standards advise the jury that non-triggermen are ineligible for the special circumstance "unless

you [the jury] are satisfied beyond a reasonable doubt that the defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of robbery . . . which resulted in the death of a human being." *Id.* The instruction, thus, specifically instructed the jury to find the special circumstance in this case if it concluded *either* that Pulido, with intent to kill, aided and abetted the murder *or* that Pulido, with reckless indifference to life, aided and abetted *the robbery*. As should be clear, those standards allow the jury to find the special circumstance based solely on the theory that Pulido aided and abetted the robbery with reckless indifference to human life.

Once we consider that instruction in the context of the entire record, it becomes apparent that the jury might have found the special circumstance-might have found aiding and abetting with reckless indifference-based solely on Pulido's proffered factual theory that he knowingly participated in the crime only after the theft and the murder were completed. There are two aspects of the cumulative jury instructions that make this possibility viable. First, the court specifically instructed the jury that aider and abettor liability for robbery "continues so long as the stolen property is being carried away to a place of temporary safety." CALJIC 9.40.1 (1991 New). The court did *not* instruct the jury that this definition of aider and abettor liability attached only to the robbery count-that the relevant assistance for *felony-murder* purposes must begin before or during the robbery and murder. The jury therefore might reasonably but erroneously have believed that Pulido aided and abetted the robbery within the meaning of the robbery-murder instruction, CALJIC 8.80.1, even if, as Pulido maintained, his participation began *after* the robbery and the shooting. Because aiding and abetting the robbery (with reckless indifference to life) sufficed to find the special circumstance under the non-triggerman guidelines and because after-the-fact participation sufficed to find aider and abettor

liability under the robbery instructions, the jury might erroneously have found the special circumstance to be true even under Pulido's proffered facts.

The second troubling aspect of the cumulative instructions is that they nowhere define "reckless indifference to human life." Although there was no evidence introduced at trial that would have supported a *legal* conclusion of reckless indifference, it seems extremely unlikely that—without instruction—the jury took a limited, legalistic view of the "reckless indifference" language. Under its ordinary meaning, "reckless indifference to human life" might very well encompass the act of assisting someone to flee the scene of a murder. In other words, a lay jury might have concluded that Pulido was recklessly indifferent to the victim's life even if it concluded that the victim was already dead before Pulido participated in the robbery.

Taking the cumulative instructions, the jury might have concluded that Pulido's after-the-fact assistance met both qualifications for non-triggerman liability under the special circumstance. Pulido was an aider and abettor within the meaning of CALJIC 9.40.1, and he acted with reckless indifference to the victim's life within the lay meaning of those words.

Given these two characteristics of the cumulative jury instructions-that the jury was specifically instructed to find Pulido guilty of aiding and abetting even if he became involved only after the robbery was completed and that the jury was never given a legal definition of "reckless indifference to human life"-it seems at least possible that the jury erroneously found the special circumstance to apply to post-murder involvement, even if it relied wholly on the supposedly curative CALJIC 8.80.1. The specific standards for non-triggerman liability in CALJIC 8.80.1, which could encompass post-murder involvement, severely undermine the government's and the California Supreme Court's single-minded reliance on the instruction's legal formulation of the special circumstance. Reading the entirety of CALJIC 8.80.1 and taking it together with all other relevant instructions, the jury was essentially instructed as follows: "You may find it to be true that the murder was committed *while* the defendant was aiding and

abetting robbery if you find (1) that the defendant began assisting a robber after the theft was complete and (2) that he did so with a reckless indifference to human life." When stated succinctly and then applied to this case, the combined instructions are, undoubtedly, internally inconsistent. In a case in which the theft and murder occurred simultaneously, it should not be possible to conclude that the murder was committed *while* the defendant was assisting a robbery if one concludes that the defendant did not start assisting the robbery until after the theft was committed. Nevertheless, the combined instructions nowhere precluded that illogical conclusion and impliedly allowed it. Without clarifying instructions from the court, it seems entirely possible that the jury simply accepted the internal inconsistency of their finding as a legal fiction, assuming that the legal formulation of the special circumstance was less important to its conclusion than the extensive standards it was given for determining whether the special circumstance applied to a non-triggerman like Pulido. At the very least, the cumulative instructions give rise to reasonable doubt as to the jury's thinking; it is not clear beyond all doubt that the jury relied on the minimal contemporaneity language contained in the legal formulation of the special circumstance.

For the same reasons, the California Supreme Court's and the government's reliance on the verdict form does not suffice to remove all reasonable doubts as to the jury's thinking. While the verdict form specified that the special circumstance applies only if Pulido aided robbery " *during the commission* of the [murder]," the standards that the jury was given for determining whether it could issue that verdict allowed it to do so based on post-murder involvement. Given the combination of instructions that the jury received, it seems possible that at least some jurors simply accepted that the verdict form did not mean what it said. Again, in light of the various instructions that allowed after-the-fact involvement to count (including not only the allegedly curative CALJIC 8.80.1 *but also* the admittedly defective CALJIC 8.81.17), the jury may have assumed that the contemporaneity language on the verdict form was simply a legal fiction.

In conclusion, neither the supposedly curative instruction

nor the verdict form removes all reasonable doubts as to the jury's thought process. In fact, when read together with all jury instructions, the supposedly curative instruction compounds rather than alleviating the possibility that the jury found a special circumstance of robbery-murder even while accepting Pulido's theory of after-the-fact assistance.

B

This theoretical possibility becomes more realistic in light of the questions that the jury submitted to the judge during its deliberations. The Supreme Court has held that questions from the jury can demonstrate that the trial court has failed adequately to instruct the jury. *See, e.g., Shafer v. South Carolina,* 532 U.S. 36, 52-53 (2001); *Simmons v. South Carolina,* 512 U.S. 154, 178 (1994); *Bollenbach v. United States,* 326 U.S. 607, 612 (1946). In this case, three jury questions reveal that the jurors were struggling with the requirements of aider and abettor liability, felony-murder, and the special circumstance robbery-murder. First, the jury asked for "instructions special circumstances for *both* count 1 and count 2" (emphasis original). This question demonstrates a certain degree of confusion given that the special circumstance does not attach to either count but, rather, intends to be a special finding of contemporaneity between the two counts. Second, the jury asked whether aider and abettor liability requires "knowledge [of the purpose of the perpetrator] prior to the commission of the crime or during the commission of the crime[.]" This question clearly demonstrates that the jurors were confused as to the timing requirements for aider and abettor liability, unsure whether Pulido could be found guilty on an aider and abettor theory if he became aware of the principal's purpose only during or after commission of the crime.

Third and most importantly, the jurors asked whether they could find felony murder based solely on actual "facilitat[ing] by aiding" or whether they must also find that Pulido intended for the robbery to occur. Like the previous question, this question demonstrates that at least some jurors believed that Pulido developed knowledge and intent only after the actual theft had

occurred; otherwise, on the alternative facts presented, there could have been little doubt that Pulido intended to commit robbery. Critically, that question also demonstrates the jurors' belief that Pulido's intent to commit *robbery* would be the determining factor in a felony-murder conviction, not Pulido's intent to commit *murder*. That distinction raises a very real possibility that the jury found the special circumstance under the "reckless indifference" prong rather than the "intentional murder" prong of the standards for non-triggerman liability.

Importantly, the judge did not answer any of those questions directly. Instead, he merely referred the jurors back to their flawed and inconsistent instructions.

Based on these jury questions, it seems not only possible but *probable* that the jurors were confused as to the timing and intent requirements in the felony-murder and special circumstance instructions. Those questions, at the very least, raise a reasonable doubt as to whether the jurors understood and relied on the contemporaneity requirement that was formally included in the verdict form and in the legal formulation of the special circumstance.

C

In conclusion, the government's theories fail to establish beyond a reasonable doubt that the error in this case was harmless. The cumulative instructions allowed a conviction for felony-murder and a finding of special circumstance robbery-murder even under Pulido's asserted factual theory that he became a knowing participant only after the robbery and shooting were completed. Furthermore, the jurors' questions raise a real possibility that at least one juror would have voted to acquit Pulido of felony-murder and special circumstance charges if the jury had been properly instructed that contemporaneity was a necessary finding. Therefore, I conclude that Pulido would be entitled to relief even under a harmless error standard.

IV

The special concurrence urges us to reexamine *Lara*. I believe *Lara* was correctly decided. *Lara* was founded on *Sandstrom v. Montana,* 442 U.S. 510, 526 (1979), which held that "when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Id.* (citing *Stromberg v. California,* 283 U.S. 359, 368 (1931)). *Sandstrom* was not an anomalous decision. In *Zant v. Stephens,* 462 U.S. 862, 881 (1983), the Supreme Court held that "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." Similarly, in *Yates v. United States,* 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks v. United States,* 437 U.S. 1 (1978), the Court stated that:

> [T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

Id.

In sum, the conclusion in *Lara* that the Supreme Court meant what it said in *Sandstrom* is firmly founded in Supreme Court jurisprudence. I would not revisit the holding in *Lara*.

V

Because I agree that *Lara* controls this case, because I believe that *Lara* was properly decided, and because Pulido would be entitled to relief even under a harmless error standard, I concur in the majority opinion.

FILED MAY 30, 2007

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ROBERT PULIDO, Petitioner-Appellee, v. CHRIS CHRONES, Warden, Respondent-Appellant.	No. 05-15916 D.C. No. CV-99-04933-CW **MEMORANDUM***
MICHAEL ROBERT PULIDO, Petitioner-Appellant, v. CHRIS CHRONES, Warden, Respondent-Appellee.	No. 05-16308 D.C. No. CV-99-04933-CW

On Appeal from the United States District Court
for the Northern District of California
No. D.C. No. CV-99-04933-CW
The Honorable Claudia Wilken, District Judge, Presiding Judge

Argued and Submitted June 13, 2006

Submission withdrawn August 1, 2006

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

Resubmitted May 30, 2007

San Francisco, California

Before: GOODWIN, O'SCANNLAIN, and THOMAS, Circuit Judges.

Michael Pulido, the petitioner-appellant, cross-appeals the denial of his habeas petition on several grounds. In a concurrently filed opinion, we affirm the grant of habeas relief. *See Pulido v. Chrones*, Nos. 05-15916 & 05-16308 (**filed** _____). The facts and prior proceedings are known to the parties and are repeated herein only as necessary.

I

A

First, Pulido contends that the prosecution "knew, or should have known" that testimony given during his trial was perjured. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). To make a successful *Agurs* claim; Pulido must show that the perjured testimony "was material, that is, there is a reasonable likelihood that the false evidence or testimony could have affected the judgment of the jury." *Morris v. Ylst*, 447 F.3d 735, 743 (9th Cir. 2006).

Pulido does not—indeed, cannot—explain how Moore's testimony was material. Pulido's explanation for the murder was that he was with Aragon at the Shell station, but that Aragon committed the murder. The jury—having deadlocked on the issue whether Pulido had personally committed the murder—apparently believed that Aragon was the shooter, and that Pulido was only guilty of murder because of his involvement in a murder-robbery. Because Moore's testimony related *only* to whether Pulido acted alone in robbing the Shell station—an issue the jury already resolved in Pulido's favor—this testimony had nothing to do with establishing Pulido's role in the murder-robbery. Thus, there is no reason to suspect that Moore's testimony would have had any relevance

to the jury. *See People v. Pulido*, 52 Cal.Rptr. 2d 373, 381 (Ct. App. 1996) ("The guilty verdicts reflect that the jury rejected appellant's claim of ignorance as to his uncle's purpose, and unwilling participation under duress[.]").

B

Based on Moore's allegedly false testimony, Pulido also contends that he is entitled to relief because "a conviction tainted by perjured prosecution testimony may violate due process, even if the prosecution was unaware of the perjury." While there is no evidence that the prosecutor knowingly suborned perjured testimony from Moore, we assume this is so for the purposes of deciding whether Pulido is entitled to an evidentiary hearing. *See Gonzales v. Pliler*, 341 F.3d 897, 903 (9th Cir. 2003).

For the reasons noted above, however, the state can show that any error was harmless beyond a reasonable doubt.[1/] Moore's testimony, according to Pulido, was "crucial to the credibility contest between Pulido and Aragon." The prosecution, however, *lost* this credibility battle: The jury concluded that Pulido played a role in the robbery during which a murder was committed, but did not believe that Pulido played alone. *See People v. Pulido*, 52 Cal.Rptr.2d at 381 ("The guilty verdicts reflect that the jury rejected appellant's claim of ignorance as to his uncle's purpose, and unwilling participation

---

1. "[T]he standard of review applicable to the *knowing* use of perjured testimony is equivalent to the *Chapman* harmless-error standard." *United States v. Bagley*, 473 U.S. 667, 680 n.9 (1985) (emphasis added). If, however, the prosecution did not knowingly present the perjured testimony, then a new trial is warranted "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. If the prosecution meets the standing for the knowing presentation of false testimony (harmlessness beyond a reasonable doubt), it can necessarily meet the lower standard for the unknowing presentation of false testimony (the reasonable probability standard). *Id.*

under duress, after the shooting.") Thus, there was no prejudicial due process violation, even assuming Moore's testimony was perjured.

II

Pulido's next claim of prosecutorial misconduct focuses on the prosecutor's allegedly vouching for Aragon's truthfulness. A claim of prosecutorial misconduct requires the court to find (1) impropriety, and (2) substantial prejudicial effect. *United States v. Weatherspoon*, 410 F.3d 1142, 1145-1146 (9th Cir.2005).

To demonstrate prejudice, Pulido must show that "it is more probable than not that the [prosecutorial misconduct] materially affected the verdict." *United States v. Christophe*, 833 F.2d 1296, 1301 (9th Cir. 1987). It is clear, however, that the prosecutorial misconduct, if any, did not have any impact on the verdict. It is critical here, once again, that the jury did *not* believe that Aragon was truthful. Because the jury rejected the prosecution's theory that Pulido acted alone, it must have rejected Aragon's testimony. Any vouching, therefore, was ineffective and not prejudicial.

III

Next, Pulido asserts that the trial court erred by failing to appoint substitute counsel for his sentencing and post-verdict motions. *See Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir.2000); *see also People v. Marsden*, 465 P.2d 44, 48 (Cal. 1970).

Under *Schell*, when considering whether habeas relief should issue because of a failure to engage in a *Marsden* hearing, we consider "whether [the] conflict deprived [Pulido] of the representation to which he was entitled by the Sixth Amendment." *Schell*, 218 F.3d at 1027. The Supreme Court has firmly rejected the view that the Sixth Amendment guarantees a "meaningful attorney-client relationship." *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983). Rather, the Sixth Amendment requires "that counsel act as an advocate," *Plumlee*

v. Del Papa, 426 F.3d 1095, 1103 (9th Cir. 2005), so "[i]n evaluating Sixth Amendment claims, *the appropriate inquiry focuses on the adversarial process*, not on the accused's relation with his lawyer as such." *Wheat v. United States*, 486 U.S. 153, 159 (1988) (emphasis added). Thus, "the essential aim of the [Sixth] Amendment is to guarantee an *effective advocate* for each criminal defendant." *Id.* (Emphasis added).

Pulido alleged that his counsel did not visit him frequently enough; yet he nowhere alleged that his counsel's failure to do so caused any prejudice. Thus, it was not objectively unreasonable for the state trial court to conclude that Pulido did not merit a hearing because his allegations—if true—were still insufficient to establish a Sixth Amendment claim: Pulido did not allege in that letter that his counsel's performance was at all deficient, that is, that counsel was not an "effective advocate." *Id.*

Thus, the state trial court did not apply Sixth Amendment jurisprudence in an objectively unreasonable manner by failing to hold a *Marsden* hearing.

IV

Pulido last contends that he is entitled to an evidentiary hearing on his trial counsel's failure to pursue apparent juror misconduct after a dictionary was found in the jury deliberation room. *See United States v. Keating*, 147 F.3d 895, 900 (9th Cir. 1998). However, the mere presence of extrinsic materials is insufficient to warrant a new trial, especially where curative instructions are given. *See id.; United Sates v. Prime*, 431 F.3d 1147, 1158 (9th Cir. 2005).

Here Pulido can satisfy neither *Strickland v. Washington*, 466 U.S. 668 (1984), prong. First, Pulido must show that "had the motion been filed, there was a reasonable probability that . . . the outcome of the trial would have been different)[.]" *Lowry v. Lewis*, 21 F.3d 344, 346-47 (9th Cir. 1994) (*citing Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). Generally, "[j]uries are presumed to follow the court's instructions." *Aguilar v. Alexander*, 125 F.3d 815, 820 (9th Cir. 1997) (*citing Richardson v. Marsh*, 481 U.S. 200, 211 (1987)), so a curative

instruction can rectify exposure to prejudicial materials; however, there are certain "extreme" circumstances under which a curative instruction will be insufficient to neutralize otherwise-prejudicial evidence. *Id.* The dictionary was found on July 1st, and the jury was admonished both on July 1st at the conclusion of deliberations *and* July 2nd *before* deliberations began that it must not consider the dictionary definition of any words. The trial judge repeatedly instructed the jury that they may not consider dictionary definitions and that *if* they had relied on dictionary definitions in their prior deliberations, they must re-evaluate any decisions they made based on the dictionary. The judge further explained that if the case came out differently, then the jury must return the verdict dictated by the definitions given, not by the dictionary definitions. This is sufficient to cure any potential harm.

Thus, because (1) there was no evidence of prejudice and (2) even if there were, a curative instruction would have been sufficient, it is far from certain that the result of the proceeding would have been different had Pulido's trial counsel objected.

Further, given the apparent strength of this claim—the lack of evidence that the jury had consulted the dictionary, the repeated curative instructions, and the relatively tame nature of the information—it was reasonable for Pulido's attorney to decide not to pursue this avenue of relief. *Lowry*, 21 F.3d at 346 (noting that because an attorney's resources are limited, the filing of additional motions is never costless).

Given the strength of Pulido's claim, and therefore the reasonableness of not pursuing such a weak claim, the state court decision cannot be called objectively unreasonable.

V

Thus, as to the four grounds for granting habeas relief presented in Pulido's certificate of appealibility, the decision of the district court is AFFIRMED.

Filed 07/18/2007

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ROBERT PULIDO,	)	No. 05-15916
	)	
Petitioner-Appellee,	)	D.C. No. CV-99-04933-CW
	)	Northern District of
v.	)	California, Oakland
	)	
CHRIS CHRONES, Warden,	)	
	)	
Respondent-Appellant.	)	**ORDER**
	)	
MICHAEL ROBERT PULIDO,	)	No. 05-16308
	)	
Petitioner-Appellant,	)	D.C. No. CV-99-04933-CW
	)	Northern District of
v.	)	California, Oakland
	)	
CHRIS CHRONES, Warden,	)	
	)	
Respondent-Appellee.	)	

Before: GOODWIN, O'SCANNLAIN, and THOMAS, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Thomas votes to deny the petition for rehearing en banc and judge Goodwin so recommends. Judge O'Scannlain would grant the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b)

The petition for rehearing and the petition for rehearing en banc are DENIED.

FILED MARCH 24, 2005
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
Oakland

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ROBERT PULIDO,	)	No. C 99-4933 CW (PR)
	)	
Petitioner,	)	ORDER GRANTING
	)	PETITION FOR A WRIT
	)	OF HABEAS CORPUS
vs.	)	
	)	
ANTHONY LAMARQUE, Warden,	)	
	)	
Respondent.	)	
	)	

INTRODUCTION

Petitioner Michael Robert Pulido, a prisoner of the State of California who is incarcerated at Soledad State Prison, filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court denied Respondent's motion to dismiss the petition as untimely and directed Respondent to answer the petition on the merits. Respondent filed an answer and Petitioner filed a traverse. The Court now addresses the merits of Petitioner's claims.

PROCEDURAL HISTORY

On June 6, 1992, Petitioner, who was sixteen years old, was

arrested for auto theft. During a series of interviews with police, he offered information about a robbery and murder which had occurred at a San Mateo gas station on May 24, 1992. As a result of Petitioner's statements he was charged with murder in the commission of a robbery (felony murder), robbery, auto theft and receiving stolen property. He was tried before a jury as an 28 adult and convicted on all counts on July 2, 1993. The jury found true the special circumstance that Petitioner committed the murder while engaged in a robbery. However, divided eight to four, the jury was unable to reach verdicts on the allegations of personal gun use and personal infliction of great bodily injury that were attached to both the murder and robbery counts and these allegations were dismissed. With respect to the murder conviction, Petitioner was sentenced under California Penal Code section 190.5(b), which applies to defendants convicted of a first degree murder committed when they were between the ages of sixteen and eighteen. Under this statute, the defendant must be sentenced either to life without parole or, at the discretion of the court, twenty five years to life. The trial court chose the term of life without parole. The court stayed the sentences on all other counts pending completion of the murder sentence. (CT 733.)

The California Court of Appeal reversed the conviction for receiving stolen property but affirmed the judgment in all other respects. The California Supreme Court affirmed the judgment of the court of appeal in a published opinion, People v. Pulido, 15 Cal. 4th 713 (1997). Petitioner then filed a State petition for a writ of habeas corpus with the California Supreme Court and that petition was denied on July 28, 1999. Petitioner filed the present petition for a writ of habeas corpus on November 16, 1999. He raises the following claims for relief: instructional error, violation of his right to allocution, the court's reliance upon inaccurate information at sentencing, two claims of prosecutorial misconduct, the denial of new counsel at sentencing and three claims of ineffective assistance of trial counsel.[1/]

---

1. In his original petition Petitioner raised an additional claim of instructional error and five ineffective assistance of counsel claims. In his

STATEMENT OF FACTS

In its published opinion, the California Supreme Court summarized the facts as follows:

Sometime between 1 a.m. and 5:30 a.m. on May 24, 1992,Ramon Flores, the cashier at a Shell gas. station in San Mateo, was shot in the head with a single .45-caliber bullet, killing him within seconds. A neighbor heard a loud bang coming from the direction of the gas station around 3:45 a.m., then a voice yelling; he could not distinguish words, but told a police detective it sounded like the person was addressing someone else. A cash register taken from the store was found the next morning in some roadside bushes elsewhere in San Mateo. Defendant's fingerprints were on the cash register, as well as on an unopened can of Coke found on the store counter. No fingerprints of Michael Aragon, who defendant testified committed the killing, were identified on either the can or the register.

Arrested on an unrelated auto theft charge, defendant volunteered that he had information about the Shell station robbery. He led police to a location where they found discarded, unused .45-caliber cartridges, which bore ejection markings resembling those on a cartridge found on the gas station floor. Defendant made a series of inconsistent exculpatory statements to police, blaming the robbery and killing successively on a man named Carlos Vasquez, on a relative of defendant's named Eduardo Alarcon and, finally, on an unidentified Tongan man. Ina telephone conversation from jail with his uncle, Michael Aragon, and Aragon's cohabitant, Laura Moore, however, defendant said he was alone during the robbery.

At the time of the killing, defendant was staying with Aragon, Moore and their children in their San Mateo home. While he was staying with them, Aragon, two of the

---

traverse, however, he expressly abandons the second instructional error claim and two of the ineffective assistance of counsel claims, conceding that the State courts acted reasonably in rejecting these claims . (See Traverse at 39, 41.)

children, and a neighbor saw defendant with a pistol, which the neighbor identified as a .45-caliber Colt. During that time, defendant twice observed that the nearby Shell station would be easy to rob because the attendant was always asleep. Aragon told defendant to get rid of the gun because he, Aragon, was on probation. He had been convicted in 1989 of burglary, possession of cocaine and contributing to the delinquency of a minor.

Aragon and Moore testified that defendant was at home when they went to bed around midnight on May 23; but was gone when they got up at around 3 a. m, to care for their baby. The next morning, Sunday, May 24, they awoke to find defendant asleep in the living room with his clothes and shoes on. He showed Aragon his wallet and said, "Look unc, almost all ones." Later that day, Moore discovered defendant was carrying a handgun and insisted he and Aragon dispose of it. At her direction, defendant took the gun apart; Moore then boiled the pieces in soapy water and put most of them in a bag, which defendant and Aragon threw away near Candlestick Park. Two pieces that Moore had retained to prevent reassembly were later given to police and identified as fitting a .45-caliber Colt.

After seeing a newspaper article about the killing, Aragon asked defendant if he committed it. Defendant denied he had, but a few days later, when Aragon asked again, defendant admitted the crime. He told Aragon he bought a Coke, then shot Flores in the face, took the register and later threw it in some bushes. In a letter from jail, however , defendant wrote to Moore, "If Michael is reading this, tell him I didn' t kill that guy, I was just messing with him."

Defendant testified, blaming Aragon for the killing. Aragon, he stated, had· seen where defendant kept the pistol. On the night of May 23, defendant and Aragon went out in Aragon's car; defendant thought the pistol was on the shelf where he usually kept it. They went to Hunters Point, where Aragon bought and smoked some cocaine. They left, but returned later for Aragon to buy and smoke more cocaine. Eventually the two arrived at the Shell station in San Mateo. Aragon went inside, defendant thought for

matches or cigarettes. Defendant waited outside. He heard a gunshot and ran into the store. Aragon was holding defendant's gun. Flores was lying on the floor, bleeding from a large bullet wound in his face. Defendant yelled at his uncle, ran out of the store and got in the passenger seat of the car. A few seconds later, Aragon came out, holding the cash register in his left hand and the gun in his right hand. He threw the register on defendant's lap and drove away.

As they were driving away from the scene, Aragon told defendant to open the register. When defendant did not comply, Aragon pointed the gun at him and insisted. Defendant got a screwdriver from the back of the car and pried the register open. At Aragon's command defendant gave him the money and dumped the register in some bushes by the side of the road. Defendant denied touching a Coke can in the store that night; he suggested he might have touched the can on some earlier occasion when he bought a drink at the store.

The defense also presented evidence casting doubt on Aragon's credibility. While admitting a prior drug possession conviction, Aragon denied he was still using cocaine at the time of the killing. However, Aragon's sister (defendant's aunt) testified he came to her house on Sunday, May 24 or Monday, May 25, at which time he was on something," but did not smell of alcohol. Her son described Aragon as acting paranoid and smelling of crack cocaine. The sister opined Aragon was a liar and a thief. A police detective testified that, when first interviewed, Aragon said he had gotten up at 12:15 a.m. Sunday to take care of the baby. When Aragon and Moore were later interviewed together at the police station, both said it was around 3 a.m. During a discussion about the time period in which the killing occurred, Aragon said to Moore, "That's when I was with you, remember?"

The jury convicted defendant of robbery and first degree murder, and found true a robbery-murder special-circumstance allegation. (§§ 211, 187, 189, 190.2, subd. (a) (17) (A).) The jury was unable to reach a verdict on

allegations of personal gun use and personal infliction of great bodily injury. (§§ 1203.075, 12022.5, subd. (a).) Defendant was sentenced to a life term without the possibility of parole.

Pulido, 15 Cal. 4th at 717-19.

STANDARD OF REVIEW

A federal writ of habeas corpus may not be granted with respect to any claim that was adjudicated on the merits in State court unless the State court's adjudication of the claims:
" (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.

The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings of the Supreme Court as of the time of the relevant State court decision. Id. at 412. But circuit law may be persuasive authority for purposes of determining whether a State court decision is an unreasonable application of Supreme Court law. Clark v. Murphy, 331 F.3d 1062, 1070-71 (9th Cir.), cert. denied, 540 U.S. 968 (2003).

In determining whether the State court's decision is contrary to, or involved an unreasonable application of, clearly

established federal law, a federal court looks to the decision of the highest State court to address the merits of a petitioner's claim in a reasoned decision. LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). If no reasoned decision exists, an independent review of the record is the only means of deciding whether the State court's rejection of the claim was objectively reasonable. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.
2003).

If constitutional error is found, habeas relief is warranted only if the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Penry v. Johnson, 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S. 619, 638 (1993)).

DISCUSSION

I. INSTRUCTIONAL ERROR

Petitioner argues that the court's erroneous instructions on the elements of felony murder, robbery and accomplice liability constituted prejudicial constitutional error.

A. Background

After the close of evidence at trial the prosecutor argued that Petitioner that Petitioner was guilty of felony murder either because he acted alone as the killer and perpetrator of .the robbery, or because he aided and abetted his uncle Michael Aragon, knowing full well what Aragon intended to do as petitioner waited for him outside. Defense counsel argued that the evidence supported the conclusion that Aragon was the killer and perpetrator of the robbery and that Petitioner, who did not know Aragon's intentions and was coerced into helping Aragon dispose of the cash register, could be found guilty only as an accessory after the fact with respect to the robbery. The trial court's instructions permitted the jury to find Petitioner guilty of felony murder if he committed the killing or aided and abetted the underlying felony. The court did not instruct the

jury that in order to convict Petitioner as an aider and abettor to felony murder it must find that, prior to the killing, Petitioner had knowledge of the killer's unlawful purpose to rob the victim and formed the intent to commit, encourage or facilitate the robbery.

On appeal of his conviction, Petitioner argued that the jury's finding of guilt on the robbery count combined with its failure to find that he personally used a gun or caused great bodily injury necessarily meant he was found guilty of felony murder based on a theory of felony murder accomplice liability, not as the killer. He argued that he could not be found guilty as an accomplice to the felony murder, however, unless he aided and abetted the underlying felony before the killing occurred. Because the jury was not instructed on this crucial timing element, the instructions were erroneous. Moreover, the error was reversible because (1) the evidence supported a finding that he was only an accessory after the fact, (2) the jurors were confused by the erroneous instructions, as evidenced by several notes they sent to the court during deliberations, (3) the court erroneously instructed the jury on the special circumstance of murder during commission of a robbery, which further confused the jury and allowed it to find the special circumstance true even if it did not believe that Petitioner aided and abetted the robbery prior to the killing, and (4) the court only added to the confusion by telling the jurors simply to reread the relevant, albeit erroneous, instructions.

The California Court of Appeal upheld the murder conviction, finding that accomplice liability for felony murder extended to one who formed the intent to aid and abet the robbery after the killing occurred, by asportation of the stolen property. The California Supreme Court agreed to review the appellate decision in order to settle a split in the California courts of appeal about the proper timing element for felony murder accomplice liability. After extensive discussion, it concluded: "An accomplice's liability for any homicide committed in furtherance of a 'common purpose' [citation omitted] or 'common design' [citation omitted] of robbery patently does not include a killing that preceded any agreement or intent to participate in the robbery, because the killer was

not then acting in pursuit of any such common design or purpose." Pulido, 15 Cal. 4th at 722. "Our cases establishing the complicity of a nonkiller in a felony murder have thus uniformly required, at a minimum, that the accomplice have been, at the time of the killing, a conspirator or aider and abettor in the felony." Id. at 723.

The court next reviewed the wording of the pertinent standard felony murder and robbery instructions from California Jury Instructions Criminal (CALJIC) given at Petitioner's trial. It identified the relevant portions of the instructions as follows:

> CALJIC No. 8.27:
>
> If a human being is killed by anyone of several persons engaged in the commission or attempted commission of the crime of [an enumerated felony], all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage or instigate by act or advice its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional or accidental.
>
> CALJIC No. 9.40.1:
>
> For the purposes of determining whether a person is guilty as an aider and abettor to robbery, the robbery continues so long as the stolen property is being carried away to a place of temporary safety.

Id. at 728.

The court concluded that the language of the standard instructions was correct in general, but "when substantial evidence would permit the jury to find the defendant began aiding and abetting an enumerated felony only after the killing

occurred, they may require modification, or qualification with a special instruction." Id. The court wrote specifically:

> Unmodified, CALJIC No. 8.27 appears to tell the jury that an aider and abettor in an enumerated felony, without any temporal or causal qualification, is liable for first degree murder in a killing committed by anyone else engaged in a felony. In combination with the []instruction concerning the duration of a robbery (CALJIC No. 9.40.1), CALJIC No. 8.27 could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule. As we have seen, that implication would be incorrect.

Id.

The court suggested that CALJIC No. 8.27 could be modified to limit the liability of late joiners by inserting the following underlined phrase into the pertinent clause of the instruction: "[A]ll persons, who either directly and actively commit the act constituting that crime, or who, at or before the time of the killing, with knowledge of the unlawful purpose of the perpetrator of the crime and with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote encourage or instigate by at or advice its commission, are guilty of murder in the first degree . . . ." Id. at 729. Alternatively, the court suggested that CALJIC No. 8.27 could be qualified by telling the jury directly, through a separate underlined phrase into the pertinent clause of the instruction, "that the rule of liability described in the instruction does not apply to a person who aides and abets the perpetrator of the crime only after the killing has been completed." Id. The court noted, "There may also be other proper modifications or special instructions that would convey the same rule."

Id.

With respect to the specifics of Petitioner's case the court declined to decide whether the trial court's failure to modify or supplement CALJIC No. 8.27 was error. Instead, it held:

> We need not decide whether the trial court in this case had any sua sponte duty to instruct on the nonliability of late joiners, because defendant cannot demonstrate prejudice from the asserted instructional error: "the factual question posed by the omitted instruction was necessarily resolved adversely to defendant under other, properly given instructions." [Citation omitted.] Specifically, the jury was instructed that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery at the time of the killing. In a modified form of CALJIC No. 8.80.1 (1990 new), drawn directly from the statutory language defining the special circumstance (§ 190.2, subd. (a)(17)), the jury was directed to determine whether or not "the murder was committed while the defendant was engaged or was an accomplice in" robbery, attempted robbery or the immediate flight from a robbery. In the special circumstance verdict consistent with this instruction, the jury found "that the said defendant, Michael Robert Pulido, engaged in or was an accomplice in the commission of or attempted commission of robbery during the commission of crime charged in count 1 (murder)." By its special circumstance verdict the jury thus found – explicitly, unanimously and necessarily – that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores.
>
> Defendant argues the special circumstance finding is not dispositive because, under another portion of CALJIC No. 8.80.1, the jury could have based its finding on defendant's being a "major participant" in the robbery and acting with "reckless indifference to human life." Such a finding, defendant asserts, could in turn have rested on defendant's assisting Aragon after the killing instead of seeking help for Flores. We disagree. Postkilling assistance to Aragon, by itself, could not have been the basis for the jury's explicit finding defendant "engaged in or was an accomplice in the

> commission of or attempted commission of robbery during the commission of (murder)," nor could it have satisfied the instructional requirement that "the murder was committed while the defendant was engaged or was an accomplice in" robbery. The special circumstance finding thus demonstrates the jury did not accept the theory defendant joined in the robbery only after Flores was killed. Any error in the failure specially to instruct on this issue was harmless.
>
> For the same reason, no prejudice could have arisen from the instructions actually given on duration of robbery and liability of accomplices for first degree felony murder. Defendant contends these instructions permitted the jury to convict him of murder on the legally inadequate ground that he assisted Aragon in taking away the robbery loot. An instruction error presenting the jury with a legally invalid theory of guilt does not require reversal, however, if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory. [Citation omitted.] As shown above, the jury's true finding on the robbery-murder special circumstance so demonstrates.

Pulido, 15 Cal. 4th at 726-27 (emphases in original). The California Supreme Court thus upheld the court of appeal's decision affirming the judgment of conviction.

B. Applicable Federal Law

As noted above, a federal writ of habeas corpus may not be granted with respect to any claim that was adjudicated on the merits in State court unless the State court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). The threshold question for a federal court reviewing a petition for a writ of habeas corpus under 28 U.S.C. § 2254 is what constituted "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 is what constituted "clearly established Federal

law, as determined by the Supreme Court of the United States" at the time the petitioner's State court conviction became final. Williams v. Taylor, 529 U.S. 362, 390 (2000); see also Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003).

At the time the California Supreme Court issued its opinion upholding Petitioner's conviction, it was clearly established under federal law that a jury instruction that relieves the prosecution of its burden of proof by omitting an essential element of the crime from the jury's consideration is a violation of due process. See United States v. Gaudin, 515 U.S. 506, 509-10 26(1995); Osborne v. Ohio, 495 U.S. 103, 122-24 & n.17 (1990); Sandstrom v. Montana, 442 U.S. 510, 520 (1979) (citing In re Winship, 397 U.S. 358, 364 (1970)); see also Evanchyk v. Stewart, 340 F.3d 933, 939 (9th Cir. 2003), cert. denied, 124 S. Ct. 2399 (2004).

It was clearly established as well that errors involving improper instructions on a single element of the offense are reversible unless shown to be harmless beyond a reasonable doubt, under the standard articulated in Chapman v. California, 386 U.S. 18 (1967). See Yates v. Evatt, 500 U.S. 391, 402 (1991) (mandatory rebuttable presumption); Carella v. California, 491 U.S. 263, 267 (1989) (per curiam) (mandatory conclusive presumption); Pope v. Illinois, 481 U.S. 497, 503 (1987) (misstatement of element); Rose v. Clark, 478 U.S. 570, 579 (1986) (mandatory rebuttal presumption); see also United States v. Neder, 527 U.S. 1, 8-15 (1999) (reaffirming reasoning of Court's earlier instructional error cases and applying Chapman on direct review to instructions which omit an essential element of the crime). Before a federal constitutional error can be found harmless under the Chapman standard, the beneficiary of the error is required to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24.

When considering an allegedly erroneous jury instruction in a federal habeas proceeding, the court first considers whether the error in the challenged instruction, if any, amounted to constitutional error. Evanchyk, 340 F.3d at 939; Ho v. Carey, 332 F.3d 587, 592 (9th Cir. 2003) (same). If so, the court then considers whether the State court's determination regarding the

effect of the error was contrary to or an unreasonable application of clearly established federal law. Evanchyk, 340 F.3d at 939. A federal habeas court may not judge the erroneous instruction in artificial isolation, but must consider the instruction in the context of the instructions as a whole and the trial record. See Middleton v. McNeil, 124 S. Ct. 1830, 1832 (2004); Estelle v. McGuire, 502 U.S. 62, 72 (1991); Ho, 332 F.3d at 595.

C. Constitutional Error

As noted above, the California Supreme Court held that a correct explanation of the timing element was necessary for proper instruction in Petitioner's case and therefore that the instructions given were not correct. However, it did not decide whether the instructions as given amounted to federal constitutional error. Respondent assumes without conceding that the instructional error, if any, affected the elements of the offense and amounted to constitutional error. (Respondent's Memorandum of Points and Authorities in Support of Answer at 7-8.) The Court reviews the trial court's instructions to determine whether the error was of a constitutional magnitude.

1. The Instructions

Prior to closing arguments, the trial court instructed the jury with the following instructions pertinent to murder and robbery. Written copies of the instructions were provided to the jury for use during deliberations.

a. Murder Instructions

> Every person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of a robbery is guilty of the crime of murder in violation of section 187 of the Penal Code.
> In order to prove such crime, each of the elements must be proved:

One, a human being was killed.

Two, the killing was unlawful.

Three, the killing was done with malice aforethought or occurred during the commission or attempted commission of a robbery.
A killing is unlawful if it was neither justifiable nor excusable.
The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime.
The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt. If a human being is killed by anyone of several persons engaged in the commission or attempted commission of the crime of robbery, all persons who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage or instigate by act or advice its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional or accidental.

(RT 1638-40.) (Based on CALJIC Nos. 8.10, 8.21, 8.27; see CT 457-60.)

b. Murder Special Circumstance Instructions

If you find the defendant guilty in this case of first degree murder; you then must determine whether the following circumstance is true or not true:
That the murder was committed while the defendant was engaged in or – or was an accomplice in – commission of or the immediate flight after committing or attempting to

commit robbery.
The People have the burden of proving the truth of the special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
Now if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
Next paragraph. If you find that a defendant was not the actual killer of a human being, or if you were unable to decide whether the defendant was the killer or an aider or abettor, you can not find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder of the first degree, or with a reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of robbery. That's section 211 of the Penal Code, which resulted in the death of a human being, namely, Ramon Flores.
In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.
You are – will state your special finding as to whether the special circumstance is or is not true on the form that will be supplied.
That has reference to certain verdict forms that will state all the alternatives available to you but would be supplied to you in the jury room for you to – for your use in arriving at a verdict.
To find that the special circumstance, referred to in these instructions as murder in the commission of a robbery is true, it must be proved:

One, the murder was committed while the defendant was engaged in the commission or attempted commission of the robbery.

Or two, the murder was committed in order to carry

out or to advance the commission of the crime of robbery or to facilitate the escape there from (sic). or to avoid detection.

In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder.

(RT 1641-43.) (Based on CALJIC Nos. 8.80.1, 8.81.17; see CT 461-63.)

c. Robbery Instructions

Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property, is guilty of the crime of robbery in violation of section (sic) Penal Code section 211.

In order, to prove such crime, each of the following elements must be proved:

One, a person had possession of. property of some value, however slight.

Two, such property was taken from such person or from his or her immediate presence.

Three, such property was taken against the will of such person.

Four, the taking was accomplished either by force, violence, fear or intimidation.

And five, such property was taken with the specific intent permanently to deprive such person of the property.

For the purposes of determining whether a person's guilty as an aider or abettor to robbery, the commission of the crime of robbery is not confined to a fixed place or a. limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety.

A thing is in the immediate presence of a person if it is so

within his reach, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.

The commission of the crime of robbery is not confined to a fixed place or a limited time. However, the scope of the commission differs depending upon the issue which you are resolving.

For purposes of determining whether the defendant is guilty of robbery as an aider or abettor, the robbery continues so long as the stolen property is being carried away to a place of temporary safety.

The robbery is complete at the time the perpetrator disposes of the loot or reaches a position of temporary safety with the stolen property.

For purposes of determining whether the defendant is guilty of robbery, felony murder, the robbery continues until the robber has reached a position of temporary safety, with or without the stolen property.

As it's used in this instruction, place of temporary safety, [*sic*] means that the suspect is no longer fleeing from the scene of the crime or trying to escape from his pursuers. A place of temporary safety need not be a specific location. Indeed, a place of temporary safety, may be reached when a suspect is still on the street or in a motor vehicle.

In determining whether a suspect has reached, (sic) a place of temporary safety, you should consider the following factors:

The suspect's subjective belief whether he or she has reached a place of temporary safety.

Two, the amount of time which has transpired between the commission of the crime and apprehension of the suspect.

Three, whether the suspect has had an opportunity to dispose of some or all of the loot from the crime.

And four, any other factor which is relevant to the determination of whether the suspect is still fleeing from the scene of the crime or is trying to escape from his pursuers.

There are two degrees of robbery. If you find the defendant

guilty of the crime of robbery, set forth in count two, I instruct you it's robbery in the second degree as a matter of law.
For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, or whether a robbery has occurred, you are instructed that the commission of the crime of robbery is not confined to a fixed place or limited period of time.
A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is in possession of the stolen property and fleeing in an attempt to escape.
Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrator or attempting to regain the stolen property.
The robbery is complete when the perpetrator has eluded any pursuers; has reached a place of temporary safety and is in an (sic) unchallenged possession of stolen property after having effected escape of such property.

(RT 1645-49.) (Based on CALJIC Nos. 9.40, 9.40.1, 944(b), 9.43, 9.4; see CT 468-75.)

d. Aiding And Abetting Instruction

The court did not instruct the jury orally on the standard definition of aiding and abetting. During deliberations the jury requested clarification about aiding and abetting liability and the court provided the jury with a written copy of CALJIC No. 3.01 defining aiding and abetting. (CT 621.)

2. Analysis

As a threshold matter, as the California Supreme Court found, the trial court's instructions were erroneous. None of the instructions informed the jury that it could find Petitioner guilty of aiding and abetting felony murder only if it found that he formed the intent to aid the perpetrator's criminal purpose

before the killing. Nor did any of the instructions inform the jury that it could find Petitioner guilty of aiding and abetting a robbery in which a killing occurred, yet not find him guilty of felony murder if he came to the aid of the perpetrator only after the killing. By contrast, the instructions informed the jury that aiding and abetting a robbery is not confined to a specific time period and continues until a place of "temporary safety" is reached, that Petitioner could be found guilty of aiding and abetting a robbery committed after the victim was killed, and that aiding and abetting a robbery could satisfy the felony murder requirement.

The jury's failure to reach a verdict on the allegations that Petitioner personally used a gun and inflicted great bodily injury indicated that at least some jurors did not believe he was the actual perpetrator of the murder and found him guilty as an aider and abettor to felony murder. Under the instructions given, however, the jury could have found Petitioner guilty without finding the essential element that he aided and abetted the robbery before the murder occurred. Thus, the Court finds that the trial court's omission from the instructions of the crucial timing element for felony murder accomplice liability amounted to federal constitutional error. See Evanchyk, 340 F.3d at 940 (omission of element of intent to kill from instructions on conspiracy to commit first degree murder amounted to federal constitutional error); Ho, 332 F.3d at 592 (second degree murder instruction which omitted element of specific intent amounted to federal constitutional error).

D. Harmless Error Review

The Court next considers whether the State court's determination that the instructional error was not reversible error was contrary to or an unreasonable application of clearly established federal law. As discussed above, instructional errors like the one in this case are reversible unless the prosecution proves that they were harmless beyond a reasonable doubt as required by Chapman v. California, 386 U.S. 18 (1967). Here, the California Supreme Court concluded that it did not need to determine whether the improper instructions constituted

reversible error because "defendant cannot demonstrate prejudice" from the omission of the timing element. Pulido, 15 Cal. 4th at 727. Relying on its own prior cases l the court explained that no prejudice could be demonstrated because " 'the factual question posed by the omitted instruction was necessarily resolved adversely to defendant under other, properly given instructions,' 15 Cal. 4th at 726 (quoting People v. Sedeno, 10 Cal. 3d 703, 721(1974)), and because the jury's special circumstance verdict demonstrated that it "necessarily found the defendant guilty on a proper theory," id. at 727 (citing People v. Guiton, 4 Cal. 4th 1116, 1130 (1993)).

The Court finds that the California Supreme Court's decision was both contrary to and an unreasonable application of clearly established Supreme Court precedent. See A.M. v. Butler, 360 F.3d 787,798-99 (7th Cir. 2004) (State court's determination that defendant was not under arrest was contrary to established Supreme Court precedent and an objectively unreasonable conclusion based on the facts); Bailey v. Rae, 339 F.3d 1107, 1114-19 (9th Cir. 2003) (State court's analysis of suppression of evidence claim was both contrary to and an unreasonable application of Brady v. Maryland, 373 U.S. 83 (1963)); Brumley v. Wingard, 269 F.3d 629, 643 n.7 (6th Cir. 2001) (under Williams v. Taylor, 529 U.S. 362 (2000), a State court decision can run afoul of both the contrary to and unreasonable application prongs of § 2254(d) (1)).

1. The California Supreme Court's Determination Was Contrary To Clearly Established Federal Law

A State court decision is contrary to clearly established federal law if it applies a rule that contradicts governing Supreme Court precedent. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam). The Supreme Court has explained that "[a]voiding these pitfalls does not require citation of our cases – indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Id. (emphasis in original). If the State court considered only State law in its analysis, the federal court must

ask whether State law, as explained by the State court, is contrary to clearly established federal law. Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001).

Here, the California Supreme Court did not cite the Chapman harmless error test or other federal law in its analysis. Rather, relying upon State law, it found that the instructional error was not reversible "because defendant cannot demonstrate prejudice from the asserted error." Pulido, 15 Cal. 4th at 726. Although the State court cited State law cases which in turn cite Chapman, the prejudice requirement the court articulated is contrary to what Chapman requires. Chapman holds that the burden of demonstrating, beyond a reasonable doubt, the absence of prejudice from constitutional error rests with the State. See 386 U.S. at 24 ("constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.") However, in Petitioner's case the State court held Petitioner to the burden of demonstrating prejudice, the opposite of what is required by governing Supreme Court precedent. The "steep hurdle" that the State court set for Petitioner to overcome was contrary to clearly established federal law within the meaning of 28 U.S.C. § 2254. See Bailey, 339 F.3d at 1118 (State court's use of "more probable than not" standard to determine whether suppressed evidence was material was contrary to Supreme Court standard that evidence is material if there is a "reasonable probability" that a different outcome would have occurred had the evidence been disclosed); Lockhart, 250 F.3d at 1230-31 (State appellate court's requirement that defendant claiming actual conflict of interest with counsel must show that the conflict prejudicially affected his representation was contrary to Supreme Court precedent that prejudice must be presumed in cases of actual conflict of interest); Evanchyk, 30 F.3d at 940 (State court's reasoning which would-affirm a conviction based on an invalid legal theory so long as there is substantial evidence to support a conviction on a valid legal theory is contrary to clearly established federal law holding that an instruction omitting an essential element of the crime is a constitutional violation).

2. The California Supreme Court's Determination Was An Unreasonable Application Of Clearly Established Federal Law

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 412-13. The inquiry under the unreasonable application clause is objective. Id. at 409; Evanchyk, 340 F.3d at 939. An unreasonable application of federal law is different from an incorrect application of federal law. Williams, 529 U.S. at 410. "[A] federal habeas court may not issue the writ- simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411.

In examining whether the State court decision was unreasonable, the Court may be required to analyze the State court's method as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003), cert. denied, 125 S. Ct. 808 (2004). Whether the State court's decision was unreasonable must be assessed in light of the record the court had before it. Holland v. Jackson, 124 S. Ct. 2736, 2737-38 (2004) (per curiam).

Even if the State court applied the correct harmless beyond a reasonable doubt test, this Court finds that its conclusion that the instructional error was· not reversible because it. was not prejudicial was objectively unreasonable in light of the facts and circumstances of this case. In addition to placing on Petitioner the burden of proving prejudice, the State court relied solely upon the jury's special circumstance verdict to find that he had not been prejudiced. It "did not undertake a careful, balanced evaluation" of the jury instructions and the record as a whole. Bailey, 339 F.3d at 1119 (internal quotation marks and citation omitted); see id. (State court's denial of Brady claim was objectively unreasonable where it did not thoroughly evaluate both the evidence the defense was prevented from presenting and the evidence each side presented at trial); Butler, 360 F.3d

at 798-99 (State court's evaluation of whether minor defendant was in custody when he confessed to crime was objectively unreasonable where court relied upon detective's statements and failed to consider the defendant's age and the circumstances of the case).

a. The Special Circumstance Verdict

The cornerstone of the California Supreme Court's determination that the failure to instruct on the timing element could not have been prejudicial to Petitioner was the jury's special circumstance verdict. Specifically, the Court concluded that " [b]y its special circumstance verdict the jury [] found – explicitly, unanimously and necessarily – that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores." Pulido, 15 Cal. 4th at 727.

The special circumstance verdict form returned by the jury consisted of the following paragraph:

> We, the jury in the above entitled cause, find the special circumstance that the said defendant, Michael Robert Pulido, engaged in or was an accomplice in the commission of or attempted commission of robbery during the commission of the crime charged in count 1 of the Information within the meaning of Penal Code section 190.2 (a) (17) (1) to be true.

(CT 658.)

Petitioner maintains that the erroneous notion that the timing of the aiding and abetting was irrelevant was in fact compounded by the language of the special verdict form because of the trial court's special circumstance instruction to the jury. This Court agrees.

As an initial matter, reliance on the special circumstance verdict form is problematic because the jury was instructed that it could find the special circumstance true only after it found Petitioner guilty of felony murder as charged in count one. If the jury first found, erroneously, that Petitioner was guilty of

felony murder by joining in the robbery after the killing, the language of the special circumstance verdict form allowed it then to find, erroneously, that the special circumstance was true because Petitioner was engaged in the robbery while he was committing felony murder, that is, while he was aiding and abetting the robbery after the killing. Even more problematic is the confusion created when the language of the special circumstance verdict form and the special circumstance instruction are considered together. The special circumstance verdict form asked the jury to decide only whether Petitioner was engaged in or an accomplice to robbery "during the commission" of the crime charged in count one. But the special circumstance instruction allowed the jury to find the special circumstance verdict true under either of two theories:

> One, the murder was committed while the defendant was engaged in the commission or attempted commission of the robbery.
>
> Or two, the murder was committed in order to carry out or to advance the commission of the crime of robbery or to facilitate the escape there from [*sic*] or to avoid detection.

(CT 463.)

The first theory allowed the jury to find the special circumstance true based on a correct statement of accomplice liability. Under this theory the murder occurred "while" Petitioner was engaged in the robbery, that is, he was involved in the robbery prior to or at the time of the killing. But the second theory did not explain the timing element for Petitioner's involvement in the robbery. Rather, it allowed the jury to find the special circumstance true if the murder was committed in order to carry out, advance or facilitate escape from the robbery. The jury had been instructed that, for purposes of aiding and abetting, lithe commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety." Accordingly, under he second theory, the jury could have found that the special circumstance applied to Petitioner because the murder

was committed in order to carry out a robbery which Petitioner aided and abetted only after the killing occurred.

Thus, the special circumstance instruction provided two theories, only one of which was correct, but the special circumstance verdict form allowed the jury to express its finding only in the language of the correct theory. Therefore, even if the jury made its finding based on the incorrect theory, its verdict could express its finding only under the correct theory. Having been instructed on two theories under which the special circumstance could be found true there would be no reason for the jury to believe that the language of the special circumstance verdict form, although different from the language of the special circumstance instruction, did not encompass both theories. In fact, the court's statement that the special circumstance verdict form "will state all the alternatives available to you" (RT 1642) served as an assurance that the form was comprehensive. This Court concludes that the language of the special circumstance verdict form and the special circumstance instruction cannot be relied upon in support of the proposition that the jury's special circumstance verdict necessarily reflected a finding that Petitioner's involvement in the robbery commenced before or during the killing.

Respondent next argues that the erroneous definitions of accomplice liability were harmless because the special circumstance instruction also required the jury to find that Petitioner acted with the intent to kill the victim. Specifically, the instruction informed the jury that it could find the special circumstance true if it determined that Petitioner, with intent to kill, aided and abetted the murder. However, it also told the jury that it could find the special circumstance true if Petitioner acted "with a reckless indifference to human life" and as "a major participant" aided and abetted the robbery. According to Respondent, based on the trial record the jury could not have found that Petitioner acted with reckless indifference to human life or was a major participant in aiding and abetting the robbery. However, the trial court did not define these terms for the jury so there is no way to know how they were interpreted.

With respect to "reckless indifference," Respondent argues that the jury could not have found that an aider and abettor

who joined a robbery after a victim has been killed was guilty of reckless indifference to human life because once the victim was dead there was no "human life" to which the acts of "reckless indifference" could apply. The Court disagrees. Based on the plain language of the instruction and a common sense analysis of the evidence, the jury could have fond that Petitioner acted with reckless indifference to the victim's life if Petitioner knew the victim had been shot but failed to come to his aid. Such an interpretation is supported by California cases which have found that reckless indifference can be based on an aider and abettor's failure to act without knowing whether the victim is dead or still alive. See People v. Hodgson, 111 Cal. App. 4th 566, 580 (2003) (substantial evidence supports finding of reckless indifference to human life where, instead of coming to aid of victim who "died nearly instantly" from gunshot wounds, defendant chose to assist shooter in escaping with loot); People v. Proby, 60 Cal. App. 4th 922, 929 (1998) (sufficient evidence to support reckless indifference where defendant knew victim had been shot, saw "pus" oozing out of his head, but made no attempt to assist or determine if victim was still alive); People v. Mora, 39 Cal. App. 4th 607, 617 (1995) (upholding finding of reckless indifference where defendant, not knowing whether victim was dead or alive after being shot, did not attempt to aid victim but instead carried through with original plan to steal victim's drugs).

Respondent also argues that the jury could not have found that Petitioner acted as a "major participant" in aiding and abetting the robbery if it believed that he joined in the robbery only after the murder. But again, based on the plain language of the instruction and a common sense analysis of the evidence, the jury could have found that Petitioner was a major participant based on his testimony that he heard a gunshot and ran into the store, saw Aragon holding the gun, saw the victim bleeding from a large bullet wound in his face, yelled at Aragon, ran out of the store, got in the passenger seat of the car and waited until Aragon came out a few seconds later holding the cash register, held the register after Aragon threw it on his lap, opened the register with a screwdriver at Aragon's command, gave Aragon the money and dumped the register in some bushes

by the side of the road. California case law supports a non-restrictive interpretation of the term "major participant." Proby, 60 Cal. App. 4th at 933-34 ("The common meaning of 'major' includes 'notable or conspicuous in effect or scope' and 'one of the larger or more important members of a kind or group.'" (citation omitted.)); see, e.g., Hodgson, 111 Cal. App. 4th at 585 (finding defendant a "major participant" where evidence did not show he supplied gun, was armed or personally took loot, but was instrumental in assisting perpetrator to escape with loot).

Contrary to Respondent's arguments, the Court concludes that under the language of the special circumstance instruction the jury could have found that Petitioner acted with reckless indifference to human life and that he was a major participant in commission of the robbery.

The Court finds that the language of the special circumstance verdict form did not render harmless the error caused by omission of the timing element for aiding and abetting felony murder. Rather, the special circumstance verdict form together with the special circumstance instruction reinforced the erroneous notion that the jury could find Petitioner guilty of aiding and abetting felony murder even if he joined in the robbery only after the killing.

b. The Jury's Questions

On appeal, Petitioner argued that the prejudicial effect of the erroneous instructions was evident from the number and specificity of questions from the jury about the relevant instructions. The State conceded that the record "suggested that the jury was in fact confused" and that the trial court "did not dispel the jury's confusion." (Respondent's Ex. D at 43). Because the court of appeal found no instructional error it did not address this argument. In his petition for review Petitioner again documented the jury's confusion, but the California Supreme Court did not discuss this evidence when concluding that the instructions were incorrect but not prejudicial. A trial judge is required to explain the law correctly to the jury so that it may apply the law to the facts and determine the defendant's

guilt as to every element of the crime with which he is charged. Ho, 332 F.3d at 593 (citing United States v. Gaudin, 515 U.S. 506, 510, 514 (1995)). Jury questions may stand as evidence that the trial court's instructions were not sufficiently clear, Belmontes v. Woodford, 350 F.3d 861, 900 & n.16 (9th Cir. 2003) (citing Shafer v. South Carolina, 533 U.S. 36, 52-53 (2001), and mid-deliberation colloquy between jurors and the court regarding jury instructions may be considered as part of the court's instructions to the jury. Id. at 903 & n.19.

The jury was instructed by the court on June 28, 1993. As discussed below, questions from the jury on June 29 and 30 show that it was confused sufficiently by the erroneous instructions that it could have found Petitioner guilty even if it believed that he aided and abetted the robbery only after the murder was committed.

The court's murder and robbery instructions had included language on aiding and abetting liability, but the court had not instructed the jury with a standard definition of aiding and abetting. During deliberations on June 29, the jury sent a note to the court which asked:

> Is "aiding and abetting" a robbery equivalent to a guilty conclusion on count 2 of (robbery)? (CT 622.)

The court responded "Yes - See attached copy of instruction 3.01" (CT 620) and attached to its answer a copy of CALJIC No. 3.01, which provided:

> A person aids and abets the commission of a crime when he or she (1) with knowledge of the purpose of the perpetrator and (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime", by act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. (CT 621.)

The following day, June 30, the jury sent a note which asked:

Re: 3.01 (1)
Does point 1 imply that the "knowledge of the purpose" is knowledge prior to the commission of the crime or during the commission of the crime? (CT 614.)

This question goes to the crux of the timing element of aiding and abetting felony murder about which the California Supreme" Court later found the jury was incorrectly instructed. The court
replied:

Re interpretation of 3.01 –
We are unable to answer the question as to an implication of whether "knowledge of unlawful purpose" must be before or during –
You should read 3.01 for its plain meaning in relation to all the other instructions bearing on this point. (CT 612.)

Thus, the court did not give the correct answer, or any direct answer at all, to the jury's crucial question.

The jury also sought clarification on the definition of felony murder aider and abettor liability contained in CALJIC No. 8.27, which, as noted above, at that time incorrectly provided:

If a human being is killed by anyone of several persons engaged in the commission or attempted commission of the crime of robbery, all persons, who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid; promote, encourage, or instigate by act or"advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental. (CT 460.)

On June 29, the day after being instructed, the jury wrote:

Felony homicide definition is unclear to us. CALJIC 8.27 (§ 189). Attached are two different interpretations of the meaning of the sentence. Which is correct? A or B? (CT 626.)

Attached to the question were two diagrams. Diagram A had the word "EITHER" at the top. The jury drew two prongs below:

EITHER
--Both robbery intended and facilitates by aiding--
--Actively commit robbery--

(CT 617.)

Diagram B had the word "ANY" at the top. The jury drew three prongs below:

ANY
--Actively commit robbery--
--Robbery intended--
--Facilitate by aiding--

(CT 618.)

In response to this question, the court wrote: "We suggest you reread 8.27 with the definition of aiding and abetting in mind from instruction 3.01." (CT 615.)

On what appears from the record to be the next day, June 30, the jury sent a further question regarding the erroneous CALJIC No. 8.27:

> Re: 8.27
> Do the words "aid its commission" from lines 8 & 9 refer to the robbery or the murder?" (CT 607.)
> Do the words on line 4 "actively commit the act constituting such crime" refer to the robbery or murder?

The court replied: "'Such crime' refers to robbery mentioned in the previous line of instruction 8.27."

The jury's questions reflect that it was confused about the elements necessary to return a felony murder verdict. Of particular concern is the jury's Diagram B, which asks whether Petitioner could be found guilty of felony murder if he only "facilitate[d] by aiding." Because the definition of aiding and abetting contained in the felony murder and robbery instructions omitted the crucial timing element, this prong would not represent a legally correct option. The court did not remedy this misconception or otherwise dispel the jury's confusion. By simply referring the jurors back to the erroneous

instruction which prompted their questions in the first place, the court did not cure the underlying instructional errors.

c. Contrary Evidence

In concluding that the instructional error was not prejudicial because the jury necessarily found that Petitioner aided and abetted the robbery prior to the murder, the California Supreme Court did not weigh the evidence Petitioner presented to contest the element of the offenses which was omitted from the instructions. Petitioner testified at trial that he was in or near the car while Aragon committed the murder and that he aided and abetted Aragon only in disposing of the cash register. The testimony by Steve Perich – who lived across the street from the gas station – suggested the presence of a second individual waiting outside the convenience store during commission of the murder. The trial court found that the evidence was sufficient to support Petitioner's theory: it gave aiding and abetting instructions (RT 1603-04) and instructions on the lesser included offense of accessory after the fact to the murder and/or robbery (CT 478, 480). The Supreme Court has held that these factors should be considered on harmless error review. See Neder, 527 U.S. at 19 ("[I]f , at the end of a thorough examination of the record, the reviewing court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless.")

d. Conclusion

In reaching its determination that any instructional error by the trial court was not prejudicial, the California Supreme Court relied solely on the jury's special circumstance verdict and did not consider the language of the special circumstance instruction and how it could have impacted the jury's special verdict. However, the special circumstance verdict form in conjunction with the special circumstance instruction reinforced

the erroneous notion that the jury could find Petitioner guilty of aiding and abetting felony murder even if he joined in the robbery only after the killing. The California Supreme Court also did not consider the import of the jury's questions regarding the timing element for aiding and abetting liability and how the trial court's answers would have compounded the jury's confusion about this essential element. Finally, the California Supreme Court did not weigh the evidence Petitioner presented to contest the element of the offense which was omitted from the instructions and which the trial court had found sufficient to support Petitioner's defense theory that he aided and abetted the robbery only after the victim was murdered.

Having reviewed the instructions as a whole and the trial record, and for the reasons discussed above, the Court concludes that the California Supreme Court's determination that the instructional error was not reversible because it was not prejudicial was an objectively unreasonable application of clearly established federal law. See Ho, 332 F.3d at 595 (State court's determination that facially incorrect instruction on elements of second degree murder was, harmless because of other properly given instructions was unreasonable application of clearly established Supreme Court precedent where instructions as a whole and trial record showed reasonable likelihood that jury convicted defendant of second degree murder, notwithstanding evidence he presented that he acted in self-defense); see also Williams, 529 U.S. at 397-98 (State supreme court's harmless error review of petitioner's ineffective assistance of counsel claim was objectively unreasonable where court failed to consider totality of omitted evidence and accord it proper weight); Wiggins v. Smith, 539 U.S. 510, 528-29 (2003) (State court opinion was unreasonable application of Strickland where State court merely assumed investigation underlying alleged strategic decision was adequate, whereas evidence demonstrated it was not adequate); Chia v. Cambra, 360 F.3d 997, 1006 (9th Cir. 2004) (State trial court correctly identified Chambers v. Mississippi, 410 U.S. 284, 294 (1973), as governing federal rule with respect to exclusion of evidence but applied rule in objectively unreasonable manner

by using "mechanistic" application of State hearsay rules, which Chambers specifically prohibits), cert. denied, 73 U.S.L.W. 3274 (U.S. Mar. 21, 2005) (No. 04-544).

E. Substantial And Injurious Effect

Petitioner is not entitled to habeas relief unless the State court's error resulted in actual prejudice, that is, the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Ho, 332 F.3d at 595. The inquiry cannot merely be whether there was enough evidence to support the result, but whether the error itself had a substantial influence. Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993) (citing Kotteakos v. United States, 328 U.S. 750, 765 (1946)). If so, the conviction cannot stand. Id. If a case arises where the record is so evenly balanced that a conscientious judge is in "grave doubt" as to the harmlessness of the error, the court must assume that the error is not harmless and the petitioner must prevail. O'Neal v. McAninch, 513 U.S. 432, 438 (1995); see Alvarez v. Gomez, 185 F.3d 995, 998-99 (9th Cir. 1999) (writ must be granted where confessions were wrongly admitted and without them facts are in equipoise as to whether evidence is sufficient to support conviction).

Here, the facts of the case are at least in equipoise as to whether, as a result of the instructional errors, Petitioner was convicted without the jury having found first that he aided and abetted the robbery prior to the killing. On one hand there is the State's evidence that Petitioner had a gun and twice observed to Aragon, that the nearby Shell station would be easy to rob because the attendant was always asleep; Aragon and Moore's testimony that they were at home at the time the crimes occurred, that Petitioner showed them a wad of money the day after the crimes, and that he had possession of his gun following the crimes; Aragon's testimony that Petitioner admitted the crime to him; and Petitioner's fingerprints on the cash register and the Coke can. This evidence clearly shows that Petitioner was involved in some aspect of the robbery, although it does not establish the point at which he became involved.

On the other hand is the jury's failure to find that Petitioner personally used a firearm or inflicted great bodily injury; the erroneous instructions; the jury's questions about the definitions of aiding and abetting; Petitioner's testimony that Aragon committed the murder and he did not join in the robbery until after the killing; Steve Perich's testimony suggesting the presence of a second individual waiting outside the convenience store during commission of the murder; testimony from Petitioner and others impeaching Aragon's credibility regarding his crack cocaine use (a possible motive for the robbery); discrepancies in Aragon's statements regarding the time the baby woke up and Aragon's statement to Moore, "That's when I was with you, remember?" during a discussion about the time period in which the killing occurred; and Moore's asking the police investigator whether he thought two people were involved in the crime and her statement that the possibility that more than one voice was heard was "crucial evidence."

While it is possible that the jury concluded that Petitioner aided and abetted the robbery prior to the victim's death, this Court has no way of determining whether this was the case. Based on the record as a whole, the Court is "simply unable to conclude," Evanchyk, 340 F.3d at 941, that the failure to instruct the jury that Petitioner could be found guilty as an aider and abettor to felony murder only if he joined in the robbery prior to the murder did not have a substantial and injurious influence or effect in determining the jury's verdict. Because the Court cannot be reasonably certain that the jury, if required to do so, would have found that Petitioner's involvement in the robbery preceded the victim's death, the Court is left with "grave doubt as to the likely effect of [the] error on the jury's verdict." O'Neal, 513 U.S. at 435. Accordingly, the Court concludes that Petitioner is entitled to habeas corpus relief on this claim of instructional error. See Evanchyk, 340 F.3d at 940-42 (petitioner entitled to writ where court in "grave doubt" as to whether jury would have found omitted element of intent to kill if required to do so); Ho, 332 F.3d at 595-96 (petitioner entitled to writ where court in "grave doubt" as to whether, in convicting petitioner of second-degree

murder, jury relied on court's erroneous general intent instruction or on correct definition of implied malice).

II. TRIAL COURT SENTENCING ERRORS

A. Background

Under California Penal Code section 190.5(b), a defendant who is convicted of a first degree murder that he committed when he was between the ages of sixteen and eighteen must be sentenced either to life without parole or, at the discretion of the court, twenty five years to life. In Petitioner'S case, the trial court chose the sentence of life without parole. The court relied in part upon information from the California Youth Authority that Petitioner had been found in possession of a drawing of an escape plan from the juvenile facility.

Petitioner argues that the trial court's sentencing decision violated his constitutional rights because the drawing was characterized inaccurately as an escape plan and because he was denied-his right to allocution at the sentencing hearing. Specifically, Petitioner claims that had he been afforded the opportunity to address the court at sentencing he would have informed the court that although he drew the picture he had no intent or plans to escape and he could provide character witnesses to testify on his behalf. Petitioner relies upon Rule 32 of the Federal Rules of Criminal Procedure in support of his argument.

Petitioner raised these claims before the California Supreme Court in his petition for a writ of habeas corpus, and they were denied without citation or comment.

B. Right To Allocution

1. Applicable Federal Law

Although the Constitution guarantees criminal defendants the right to speak on their own behalf at trial, it does not require that the court inquire personally of defendants whether they would like to address the court during sentencing. The

failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before his sentence is imposed is not constitutional error. See Hill v. United States, 368 U.S. 424, 428 (1962).

2. Analysis

Because the right to allocution at sentencing is not constitutionally mandated, the trial court did not err by failing to provide Petitioner with the opportunity to address the court. Moreover, Rule 32 of the Federal Rules of Criminal Procedure, which provides for a right to allocution at sentencing, see Fed. R. Crim. P. 32(i) (4) (A), is not applicable to Petitioner's claim because the Federal Rules are rules of procedure for criminal proceedings in federal, not State, court and the right of allocution provided by Rule 32 is not constitutionally mandated. A writ of habeas corpus is available to a State prisoner "only on the basis of some transgression of federal law binding on the state courts." Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)), cert. denied, 478 U.S. 1021 (1986).

Petitioner has not established a constitutional violation. Accordingly, this claim for relief is DENIED.

C. Reliance On Inaccurate Information

1. Applicable Federal Law

State sentencing courts must be accorded wide latitude in their decisions as to punishment. See Walker v. Endell, 850 F.2d 470, 476 (9th Cir. 1987), cert. denied, 488 U.S. 926, and cert. denied,.488 U.S. 91 (1988). Generally, therefore, a federal court may not review a State sentence that is within statutory limits. See id. A federal court. may vacate a State sentence imposed in violation of due process, however, if the court relied upon materially false or unreliable information at sentencing.

Id.

2. Analysis

The trial court made the following findings upon sentencing Petitioner to life without the possibility of parole:

> Number one, the victim in this case was, according to the evidence, a hard working, young man from Mexico, who was holding down several jobs, going to school, and he--his life was ended by a shot from a gun fired by the defendant in the middle of the shift at this gas station where he worked one of his several jobs.
>
> He obviously hoped for more than life gave him but that's the first thing that impresses me about this case from the evidence.
>
> Second thing that impresses me about it from the evidence is, there is no questions in my mind, whatsoever, that this defendant shot--shot the victim. He had the gun before. He had the gun afterwards. And since then he has distinguished himself in custody by formulating plans for an escape, apparently and evidencing no remorse whatsoever.
>
> I can see no reason to, in effect do anything to thrust this man back in society. (RT 2040-41.)

Petitioner argues that the trial court should not have relied upon the drawing taken from him because it did not evidence that he intended to escape. The California Youth Authority characterized the drawing as follows:

> Apparently, Michael was found to be in possession of a map of juvenile hall which included information about how long it would take to get from one point to another, the position of staff, arrows indicating direction out through potential exits, etc. Staff believed that the map was an escape plan. When questioned, Michael admitted to drawing up the plan, but denied any intentions of attempting to escape. He claimed he drew up the plan for another detainee who did escape from the institution. (CT 672.)

Petitioner's argument does not go to the question whether the information presented to the trial court was "materially false" or "unreliable." The existence of the drawing, that Petitioner drew it and that it was used to assist someone's

escape were not disputed. Rather, Petitioner's argument boils down to whether the trial court accorded the drawing proper weight in reaching its sentencing determination. This is a question of State law not reviewable by this Court. In any event, the Court finds that there was more than a "minimal factual basis" to justify the trial court's consideration of the drawing in conjunction with the other sentencing factors. Walker, 850 F.2d at 477.

Because the California Supreme Court's rejection of this claim was not contrary to or an unreasonable application of clearly established federal law, this claim for relief is DENIED.

III. PROSECUTORIAL MISCONDUCT

Petitioner raises two claims of prosecutorial misconduct: (1) that the prosecutor knowingly used false and perjured testimony presented by Laura Moore,[2/] and (2) that he vouched improperly for Michael Aragon's credibility during closing arguments.

A. Moore's Testimony

1. Background

Petitioner was staying with his uncle Michael Aragon and

---

2. In his traverse, Petitioner refers back to his original petition to argue that this claim applies to the testimony of both Michael Aragon and Laura Moore. While it is true that Petitioner makes reference in his petition to perjured testimony by both Aragon and Moore, the claim that he ra ises is, verbatim, "The Court should find that Petitioner did not receive a fair and impartial trial, Moore's false testimony was sub stantially material or probative on the issue of guilt, and it is very probable a different result on the murder charge and special circumstance allegation would have occurred had she testified truthfully." Petition at 33. The claim as he raised it to the California Supreme Court was captioned in substantially the same way and his argument there. focused solely on Moore's testimony. Thus, this Court rejects Petitioner's characterization of the present claim as applicable to both Moore and Aragon.

Aragon's girlfriend Laura Moore when the crimes occurred. At trial, both Aragon and Moore testified for the prosecution. According to their testimony, on Saturday night, May 23, 1992 (the night of the crimes), Moore and Aragon went to play Bingo in Daly City. They left Petitioner behind to watch the children. They returned home from playing Bingo at about 11:00 p.m. Petitioner was home at the time.

Around 3:00 a.m. the baby woke Aragon and Moore. They attended to the baby and Moore went to check on the other children. In making her rounds, Moore discovered that Petitioner was not in the house. Aragon testified that he confirmed her finding while Moore testified that Aragon simply went back to sleep. The next morning Moore saw Petitioner asleep on the floor in the living room.

On the afternoon of June 9, 1992, detectives Minahan and Miles came to Moore's house to interview Aragon and Moore. The detectives told Aragon and Moore that Petitioner had been arrested and that he was giving them information about the homicide at the gas station. Shocked and upset by the visit from the police, Moore called her priest, Father Ahlbach, who came over immediately. He found Moore running around the house, screaming. Moore wanted to go to the police station to talk to the police. They did not go until around 5:00 p.m. Moore brought two pieces of the gun. Moore testified that she and Aragon did not discuss what they would say at the police station beforehand. But she did say she was going to tell the police all she knew.

Detective Minahan, called by the defense, testified that when he first interviewed Aragon, Aragon said he woke up around 12:15 a.m. to attend to the baby, then went to sleep. He saw Petitioner when he woke up the next morning. At the station house, both Aragon and Moore said they got up to take care of the baby at around 3:00 a.m. Aragon said to Moore, "That's when I was with you, remember?" (RT 911, 912.) Also at the station house, Moore asked Minahan if two people were involved. Minahan said he was not sure, but possibly voices were heard. Moore asked if it could have been Petitioner's rap music. She said that was "crucial evidence." (RT 912.)

On March 29, 1996, close to three years after Petitioner

was convicted, Moore signed a declaration under penalty of perjury in which she states that the testimony she gave at trial regarding Aragon's whereabouts on the night of the crime was false. She writes:

> I am making this declaration to set the record straight. Michael Aragon picked me up from Bingo at about 11:00 p.m. on May 23. Michael Aragon then said he was going to get cigarettes. I spoke on the telephone to my friend Marie Niu from about 11:00 p.m. to 1:00 a.m. My baby woke up at about 2:00 a.m. and I fed her a bottle. Michael Aragon's testimony that he woke up at 3:00 a.m. to change the baby and give her a bottle was false.
>
> When I woke up at about 7:00 a.m., Michael Aragon was in bed next to me. I do not know what time he got in. At about 10: 00 or 11: 00 a.m., Michael Aragon said "I think little Michael finally did it." Michael Aragon was very excited. Michael Aragon was on crack cocaine the entire day of May 24.
>
> Before Michael Aragon and I spoke with the police on June 9, 1992, I decided I would protect Michael Aragon and say he was home on the night of May 23-24. I was afraid that Michael Aragon would injure me or my children if I told the police he was not home. Michael Aragon was always abusive with me and had hit me even when I was pregnant. During the trial I asked Michael Aragon if he had committed the murder. He said "I am a thief and not a murderer." After Michael Aragon had finished testifying, he went fishing for a couple of days. He said that he was under so much stress during the trial.
>
> The reason I am telling the truth now is that I have become more religious and want to clear my conscience. In December, 1995, I was baptized into the Mormon religion. Before I was baptized, I told the bishop that my daughter's father was involved in a crime and that I had lied about it. He told me I should talk to the police and tell them the truth.
>
> On December 18, 1995, I contacted John Minahan, who was the investigating officer, and left him a message that I had lied about Michael Aragon's whereabouts during the night

of May 23-May 24, 1992. Officer Minahan contacted me on December 19 and told me he would contact me again on January 2, 1996. I was unable to speak to Officer Minahan until January 12, 1996, because I was recovering from back surgery.

On January 12, 1996, I went to the San Mateo Police Department and told Officer Minahan essentially what I have said in this declaration. I told him that I believe Michael Pulido shot the gas station attendant but that Michael Aragon put him up to it. Actually, I do not know who killed the gas station attendant, but I do know Michael Aragon was not home at the time of the murder.

My only motivation for making this declaration is to see that the truth comes out. I am afraid that when Michael Aragon finds out about this, he will try to harm me. I recently had to get a protective order against him because he was harassing me. I am also afraid that I could be prosecuted for perjuring myself at the trial.

(Points and Authorities in Support of Petition for a Writ of Habeas Corpus at 64 (P&As) (Ex. B).)

In January, 1996, Marie Niu, a friend of Moore's, made a statement to the San Mateo Police Department regarding a conversation she had with Moore on the night of the crimes. The report states:

Niu had recently spoken with Laura Moore and was aware of the purpose of my visit. Niu stated that during the early morning hours of 5-24-92, from approximately midnight until 0200, she was on the telephone with Laura Moore. She recalls the incident as it was the Memorial Day weekend and they were planning a picnic together for 5-24-92. Moore was upset as she spoke with Niu because Michael Aragon was not home as they talked on the telephone. Moore was telling Niu that the plans for 5-24-92 were off because Aragon was not home.

As a result of this telephone conversation on 5-24-92, when Michael Pulido was implicated in the homicide at the Shell Station, Niu confronted Moore about her possibly covering

for Aragon's whereabouts at the time of the homicide. Niu tried to convince Moore not to lie for Aragon without success.

(P&As at 67 (Ex. C).)

Petitioner argues that Moore's perjured statements at trial call into doubt the veracity of Aragon's testimony about his whereabouts on the night of the crime and demonstrate that Petitioner was telling the truth about Aragon's involvement. Petitioner claims that the prosecutor knowingly relied upon this perjured testimony to convict him.

Petitioner raised this claim before the California Supreme Court in his petition for a writ of habeas corpus and the claim was denied without citation or comment.

2. Applicable Federal Law

When a prosecutor obtains a conviction by the use of testimony which he knows or should know is perjured, such conviction must be set aside if there is any reasonable likelihood that the testimony could have affected the judgment of the jury. See United States v. Agurs, 427 U.S. 97, 103 (1976). The same result obtains when the prosecutor, although not soliciting false evidence, allows it to go uncorrected when it appears. Napue v. Illinois, 360 U.S. 264, 269 (1959). If the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts. United States v. LaPage, 231 F.3d 488, 492 (9th Cir. 2000). Prosecutors will not be held accountable for discrepancies in testimony where there is no evidence from which to infer prosecutorial misconduct and the fairness of the trial was not materially affected. See United States v. Zuno-Arce, 44 F.3d 1420, 1423 (9th Cir. 1995), cert. denied, 516 U.S. 945 (1995).

To prevail on a claim based on Agurs/Napue, the petitioner must show that: (1) the testimony was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material. United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003) (citing

Napue, 360 U.S. at 269-71), cert. denied, 540 U.S. 1208 (2004).

3. Analysis

The parties dispute whether Moore's recantation can be deemed reliable. Assuming arguendo that the recantation is reliable and 26 that the pertinent portion of Moore's trial testimony was false, the parties also dispute whether the prosecutor knew or should have known this was the case. Moore did not recant her testimony until almost three years after the trial. Nowhere in her declaration does she assert that she told the prosecutor previously or that he otherwise knew that her trial testimony was false. Therefore, evidence of the prosecutor's knowledge must come from other sources.

Respondent argues that the only evidence presented by Petitioner is the prosecutor's argument that Petitioner could be found guilty of aiding and abetting. Under this theory, the prosecutor would not have argued aiding and abetting liability unless he knew that evidence existed which implicated Aragon in the crimes. Petitioner maintains that the record contains additional evidence which shows that the prosecutor knew or should have known that Moore was lying about Aragon's whereabouts at the time of the crimes:

-- Steve Perich, the witness who lived across the street from the gas station, gave testimony which pointed to the presence of two individuals at the crime scene. (RT 279-82.)

-- Detective Minahan testified that when he first interviewed Aragon, Aragon stated that he had fed the baby at about 12:15 a.m., but when Minahan spoke to Aragon the next day at the police station Aragon said he had gotten up at about 3:00 a. m. (RT 911.)

-- During the interview at the police station, while discussing the time of the killing, Aragon turned to Moore and said "That's when I was with you, remember?" (Id.)

-- Moore asked Minahan if there were two people involved in the killing (RT 912), Minahan said that voices were heard, and Moore responded that maybe the sound was Petitioner's music. Moore then commented, "That can be crucial evidence." (Id.)

-- Marie Portillo, Aragon's sister, testified that in her opinion Aragon is "a liar, he's a thief, he's a manipulator, and he's a user." (RT 881.)

-- Dr. William Ayers, a child/adolescent psychiatrist, examined Petitioner and testified at trial that in his opinion Petitioner would lie to protect Aragon. (RT 1477.)

-- On June 15, 1992, Michael Aragon voluntarily submitted to a polygraph examination at the Sheriff's Office in Redwood City, the purpose of which was to determine if Aragon had any knowledge of or was a participant in or responsible for the murder. The polygraph examiner prepared a report, in which he described the following "pertinent test questions" and answers:

Q. Regarding that murder at the Shell Station on May 24th, do you know where that gun is right now?

A. No.

Q. Did you, yourself, shoot Ramon Flores?

A. No.

Q. Did *you* receive any of that money stolen from the Shell Station?

A. No.

Q. Were you present at the Shell Station the night Ramon Flores died?

A. No.

The report concluded: "There were significant emotional disturbances indicative of deception in the Polygraph Records of Michael Aragon. Therefore, it is the opinion of this examiner, based upon this subject's Polygraph Records, that he is not telling the truth in this matter." (Traverse at 57-58 (Ex. B).)

-- Evidence existed which showed that on -September 29, 1990, Aragon robbed a convenience store in Logan New Mexico and took a cash register by tearing the wires out of the wall, the same modus operandi used at the convenience store in 1992. The trial court denied the defense motion to admit this evidence. (RT 72.)

Although the evidence presented by Petitioner raises doubts as to Aragon's credibility, it does not establish that the prosecutor knew or should have known that Moore was lying.

But even if the evidence did support Petitioner's proposition, the dispositive question is whether there is any reasonable likelihood that Moore's false testimony could have affected the judgment of the jury, Agurs, 427 U.S. at 103, that is, whether it was material, Zuno-Arce, 339 F.3d 889.

Respondent does not address the element of materiality. Petitioner argues that Moore's testimony was material to the jury's decision because she provided the only alibi for Aragon's whereabouts at the time of the crimes. According to Petitioner, whether the jury believed that Aragon participated in the crimes was crucial to its finding Petitioner guilty.

Petitioner quotes the following portion of the opinion of the California Court of Appeal as support for his argument:

> [T]he prosecution argued appellant was either the perpetrator of the robbery, and the killer, or that he drove his uncle to the store fully aware of the plan to commit robbery, either waited outside as a lookout; or entered the store with his uncle, and helped carry away the loot and dispose of the register. Appellant, on the other hand, claimed he was nothing more than an accessory after the fact based on his admission that he helped dispose of the cash register only after reaching a point of temporary safety. The guilty verdicts reflect that the jury rejected appellant's claim of ignorance as to his uncle's purpose, and unwilling participation under duress, after the shooting. The evidence that, even if appellant was not the perpetrator, he was fully aware of the plan to rob, "and was either a lookout, or actually entered the store with Aragon, was overwhelming: Aragon used appellant's gun, and appellant offered a complex and inconsistent explanation for how his uncle might have obtained the gun without appellant's knowledge, and why after the murder appellant was carrying the gun in the car he was driving. Appellant had commented several times that the station would be easy to rob. He admitted that he and his uncle committed some burglaries together. When he saw the victim was shot he did nothing to help him, and instead ran out of the store and got in the car with his uncle, and helped carry away and dispose of the register. The numerous inconsistent

> stories he told the police all reflect consciousness of guilt, and share the common theme of attempting to exculpate himself by implicating another. His testimony failed to explain physical evidence such as the presence of his fingerprints on the Coke can found in the store, and on the register, and the absence of Aragon's prints, and his statement to Aragon that he had committed the robbery and the shooting.

(Traverse at 49 (Ex. A) (Opinion of the California Court of Appeal at 11-12).)

On balance, the Court finds that even if the prosecutor knew or should have known that Moore·' s testimony was false, there was no prejudice to Petitioner. First, there was enough other evidence before the jury from which. it could have determined that both Moore and Aragon were lying, not only about Aragon's whereabouts on the riight of the crimes but with respect to other matters as well. Second, as discussed in detail above, the jury likely found Petitioner guilty based on a theory of aiding and abetting, which means it did not believe that he acted alone; Aragon was the only other possible actor identified. Finally, nothing in Moore's or Aragon's testimony could confirm for the jury whether Petitioner acted only as an accessory after the fact. Moore states in her declaration that she believes that Aragon committed the robbery with Petitioner, but she does not know. Therefore, she could not know who aided whom at what point.

The Court finds that the State court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law.

B. Improper Vouching

1. Background

Petitioner's second claim of prosecutorial misconduct stems from what he alleges was improper vouching for Aragon's credibility. In his closing argument, the prosecutor commented

as follows:

> The defendant has to name Michael Aragon. It's his only way out. But there's just nothing to implicate Michael Aragon at all. You start watching the witnesses. You saw Michael Aragon. He testified . . . for nearly a day. He came forward without any promises of immunity. He's just under subpoena to tell the truth and he spent practically a full day going through the detailed events of that day with extreme particularity to many particular questions; detailed explanation and remembrances of what he did.
>
> And I don't know what you thought but he seemed quite truthful. He gave vivid detail and it was corroborated by other people. And you know, his testimony stood up during cross-examination. Mr. Concannon [defense counsel] tried to cross-examine him. Only liars get caught in cross-examination.
>
> When you tell the truth and you start, a good defense attorney starts to pick apart the attorney. A liar can't stand up to that.
>
> You heard Michael Aragon, that was not the testimony of a liar. And was there a killer? Was Michael Aragon a killer? No way. That's not a killer . . . (RT 1670-71.)

Petitioner argues that the prosecutor's argument was not based on the evidence and therefore amounted to vouching.

Petitioner raised this claim to the California Supreme Court on habeas corpus and that court denied the claim without citation or comment.

2. Applicable Federal Law

Prosecutorial misconduct occurs when a prosecutor vouches for the credibility of a witness by giving personal assurances of the witness's truthfulness or suggesting that there is information not presented to the jury which supports the witness's testimony. See United States v. Berger, 295 U.S. 78, 86-88 (1935); see also Lawn v. United States, 355 U.S. 339, 359-60 n.15 (1958). Such vouching is misconduct because it poses the following two dangers: it may lead the jury to convict on the basis of evidence not presented, and it carries with it the

imprimatur of the government, which may induce the jury to adopt the government's judgment rather than its own. See United States v. Young, 470 U.S. 1, 18 (1985).

The Supreme Court has created a general framework for determining when vouching occurs. In specific scenarios, the Ninth Circuit has concluded that vouching occurs when a prosecutor makes statements which imply that the government can guarantee a witness's truthfulness, see, e.g., United States v. Ortiz, 362 F.3d 1274, 1278-79 (9th Cir. 2004) (prosecutor improperly vouched for witness by implying that the court would determine the truthfulness of her testimony, and for all of its witnesses by suggesting in argument that he or the court would know whether these witnesses gave truthful testimony); United States v. Necoechea, 986 F.2d 1273, 1378 (9th Cir. 1993) (prosecutor's statement that witness agreed to "testify truthfully" in exchange for plea bargain improperly implies that government can guarantee truthfulness); or personally assures that the witness is telling the truth, see Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir.) (prosecutor vouched for witness's credibility by saying, "He is a credible witness. He was telling you the truth."), cert. denied, 516 U.S. 1017 (1995).

3. Analysis

In this case, the prosecutor stated that Aragon was "under subpoena to tell the truth," that Aragon's testimony "seemed quite truthful," that he was not a liar because his testimony stood up on cross-examination and that" [Aragon's] not a killer." Although mild, the first statement constitutes vouching because it implies that the court's subpoena power guaranteed Aragon's truthfulness on the stand. The prosecutor's other statements, although colored by the vouching, are less troubling because they draw inferences from Aragon's testimony.

Even if vouching occurred, to warrant habeas relief it must so infect the trial with unfairness as to make the resulting conviction a denial of due process. Davis v. Woodford, 384 F.3d 628, 644 (9th Cir. 2004). Aragon's credibility was central to the case against Petitioner, but Petitioner was able to attack Aragon's testimony on cross-examination thoroughly. During

his own testimony Petitioner brought out possible motives and scenarios implicating Aragon as the killer, and through questioning other witnesses (such as Aragon's estranged sister and her family) he was able to emphasize Aragon's history of drug use, a prior conviction, discrepancies in his testimony and his reputation as a liar. The trial court instructed the jury that in evaluating the credibility of a witness it could consider the existence of a bias, interest, or other motive, as well as discrepancies in testimony and prior crimes. It also instructed the jury that statements by attorneys are not evidence.

Thus, even if the jury considered the prosecutor's vouching it had plenty of other evidence to consider which showed that Aragon was not telling the truth. And whether the jury believed Aragon or not, it also had plenty of other evidence to consider independent of his testimony to determine Petitioner's guilt. The prosecutorial misconduct consisted of an isolated incident of fairly mild vouching. Based on the record as a whole, it did not render Petitioner's trial fundamentally unfair and the State court's denial of the claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, this claim for habeas corpus relief is DENIED.

IV. DENIAL OF NEW COUNSEL AT SENTENCING

Petitioner alleges that the trial court erred when it failed to appoint substitute counsel for purposes of his motion for new trial and sentencing. He maintains that as a result he was provided with the ineffective assistance of counsel during these proceedings.

A. Background

Petitioner was convicted on July 2, 1993, and sentenced on March 31, 1994. In a letter received by the trial court on January 12, 1994, Petitioner complained to the trial judge about his trial attorney and asked the judge to appoint a new one.

Petitioner wrote:

Dear Judge Harrington,

> Hello my name is Michael Pulido. I'm due in your court in a couple of months. I'm going to try to make this short and to the point. For I know you are a busy man.
> Your honor I am requesting that I change Attorney[]s before I get sentenced. Ever since I met him he make it seem like I was the one who did the crime. I've been in jail now for almost 2 years and he has only come and visited me five times. When he does come visit me we don't talk that much about anything. He just tells me when my next court date is then he leaves. I don't know much about the law so I didn't think I could change him or anything. I asked my Grandmother to speak with him and when she did he threatened to throw her[] in jail. My Grandmother's number is [. . .] if you want to ask her yourself. I was only 16 when I got him and now I'm 18 pushing on 19 and I still don't know what's going to happen to me.
> My Attorney and I just don't get along. I want an Attorney that cares what happens to his client not just work hours. I need your help with this. Please.

(P&As at 70-71 (Ex. D); CT 667-68.)

According to Petitioner, the trial court never responded to his letter and no Marsden hearing was held.[3]

On March 18, 1994, defense counsel filed a motion for new trial a motion for new trial based on a tape-recorded statement made on January 17, 1994, by Petitioner's brother, Salvador Pulido, to the defense investigator. Salvador, who was incarcerated at Pelican Bay State Prison at the time, told the investigator that when he and Petitioner's grandmother, Corinne Pulido, returned from Mexico after learning of Petitioner's arrest, Aragon came to the house, apparently intoxicated, and cried and relayed information to Corinne, in Salvador's presence, about how the gas station attendant had been shot through the eye, where the bullet came out and the

---

3. Marsden requires the trial court to hold a hearing to permit a criminal defendant requesting substitution of counsel to specify the reasons *for* his request. People v. Marsden, 2 Cal. 3d 118 (1970).

way blood was splattered on the walls. Salvador stated that he did not provide this information in an earlier March, 1993, interview because he did not remember it until after the investigator left.

The trial court denied the motion for a new trial on the ground that admission of the statement would not render a different result probable on retrial. The court found the jury would not credit Salvador's testimony because it lacked sufficient detail not otherwise available from newspaper accounts to suggest that Aragon must have been present at the scene. The California Court of Appeal affirmed the trial court's decision and stated other reasons why the jury was not likely to credit Salvador's statement: he did not come forward until after his brother was convicted, he was incarcerated at Pelican Bay State Prison and therefore was a convicted felon with little to lose by offering perjured testimony, and "Aragon's statement was allegedly made in the presence of, and directly to, Corinne Pulido, yet the defense did not offer her testimony." (Opinion of the California Court of Appeal at 18.)

In his petition for a writ of habeas corpus to the California Supreme Court, Petitioner argued that the trial court's failure to 'appoint substitute counsel resulted in ineffective assistance of counsel, as reflected by counsel's failure to provide corroboration for Salvador's statement by interviewing and obtaining testimony from Corinne. Petitioner attached to his petition a notarized declaration from Corinne in which she stated in pertinent part:

> I Mrs. Corinne Pulido solemnly swear that during the closing week of my grandson[']s trial in the County of San Mateo [¶] I appro[a]ched his defense counsel, Mr. Patrick Concannon to inquire into the facts of his case since he was only 17 at the time and I was his legal guardian.
> Mr. Concannon stated that if I call him, inquire into his case or even show up in court he would have me arrested. I am a lay person in the law, so I followed his instructions, and did what he said, for I was afraid he had the power to do so.

(P&As at 73 (Ex. E).)

Petitioner also argued that counsel was ineffective because he failed to call other character witnesses to testify on Petitioner's behalf at sentencing. The California Supreme Court denied the claim without citation or comment.

B. Applicable Federal Law

A criminal defendant who cannot afford to retain counsel has no right to counsel of his own choosing. See Wheat v. United States, 486 U.S. 153, 159 (1988). Nor is he entitled to an attorney who likes and feels comfortable with him. See United States v. Schaff, 948 F.2d 501, 505 (9th Cir. 1991). The Sixth Amendment guarantees effective assistance of counsel, not a "meaningful relationship" between an accused and his counsel. See Morris v. Slappy, 461 U.S.1, 14 (1983). Nonetheless, to compel a criminal defendant to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive the defendant of any counsel whatsoever. United States v. Moore, 159 F.3d 1154, 1159-60 (9th Cir. 1998). The denial without a hearing of a motion to substitute appointed counsel based on allegations of an irreconcilable conflict implicates the defendant's Sixth Amendment right to counsel. Schell v. Witek, 218 F.3d 1017, 1023 (9th Cir. 2000).

The ultimate inquiry in a federal habeas proceeding is not whether a hearing was held or a motion improperly denied. It is whether the petitioner's right to counsel was violated. See id. at 1024-25. The habeas court considers whether the trial court's denial of or failure to rule on the motion "actually violated [petitioner's] constitutional rights in that the conflict between [petitioner] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Id. at 1026. Where the issue is not a petitioner's right to choice of counsel or a total denial of counsel, the basic question is whether the conflict between the petitioner and his attorney prevented effective assistance of counsel. Id.

To establish ineffective assistance of counsel, a petitioner

must demonstrate both that counsel's performance was deficient and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

C. Analysis

Based on the allegations in Petitioner's letter to the trial court and his request for new counsel, the court erred by failing to hold a Marsden hearing to address Petitioner's concerns. See Schell, 218 F.3d at 1025. The Court finds that counsel's representation of Petitioner on the new trial motion and at sentencing did not amount to ineffective assistance, however. The duty to investigate and prepare a defense does not require that every conceivable witness be interviewed. Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). A claim of failure to interview a witness cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel. Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986). When the record shows that the lawyer was well-informed and the defendant fails to state what additional information would be gained by the discovery he now claims was necessary, an ineffective assistance claim fails. Id. To establish prejudice caused by the failure to call a witness, a petitioner must show that the witness was likely to have been available to testify, that the witness would have given the proffered testimony and that the witness's testimony created a reasonable probability that the jury would have reached a verdict more favorable to the petitioner. Alcala v. Woodford, 334 F.3d 862, 872-73 (9th Cir. 2003).

Salvador Pulido's statement is dated January 17, 1994, five 3 days after Petitioner wrote his letter to the court. At that point counsel clearly was conducting investigations and interviewing witnesses pertinent to preparing the motion for a new trial. Petitioner argues that counsel should have interviewed Corinne in order to obtain corroboration for Salvador's statement, but he has never provided a declaration

from Corinne attesting to what Aragon said. Nor has he established that counsel did not interview Corinne and make the tactical decision not to call her as a witness. Moreover, even if counsel had obtained a statement from Corinne which corroborated what Salvador said in his statement, Corinne's account was unlikely to be more persuasive than Salvador's. It, too, would lack sufficient detail not otherwise available from newspaper accounts, Corinne had not come forward before her grandson was convicted, and the only corroboration she would have had for her statement was the word of Salvador, a known felon.

Petitioner has not shown that counsel's failure to obtain a statement from Corinne reflected deficient performance or resulted in prejudice. This is equally true with respect to the unidentified character witnesses whom Petitioner claims counsel should have called. Because counsel's representation of Petitioner on his motion for new trial and at sentencing did not amount to ineffective assistance of counsel, this claim for habeas corpus relief is DENIED.

V. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

In his original petition, Petitioner raised five claims of the ineffective assistance of counsel at trial. In his traverse he expressly abandons two of these claims, conceding that the State court's adjudication of the claims was a reasonable application of federal law under 28 U.S.C. § 2254. The Court addresses the remaining claims.

A. Failure to Pursue Juror Misconduct Claim

1. Background

At the close of jury deliberations on July 1, 1993, a substitute judge for the first time admonished the jury not to "make any independent investigation or look up any words in the dictionary, any legal mention of words in the dictionary." (RT 2002.) The next morning, which turned out to be the last day of deliberations, a dictionary was discovered in the jury

room. Before the jury returned to deliberations, the court addressed it as follows:

> Ladies and Gentlemen, by a set of circumstances that I won't go into, it has come to the attention of the court that you have apparently a dictionary in the back room and it was noticed overnight.
>
> You were advised not to do independent research and I guess I didn't "mention dictionary, but Judge Severian apparently did.
>
> At this point I am instructing you that, to the extent that you're still deliberating and have arrived at some kind of partial conclusion about any part of this case, that that [*sic*] cannot be based upon a definition in the dictionary that is inconsistent with any of the definitions that were given to you of the specific legal terms and concepts that were used in this case.
>
> What I'm saying to you is, before you arrive at any verdict, you must make certain in your minds that it was based upon the instruction and not upon some definition in a dictionary.
>
> I have nothing else to say other than that. If there is a dictionary back there, please give it to the bailiff.

(RT 2002-03.)

A short while later, before the jury resumed deliberations, the court added:

> I think there is some curiosity on our part whether you used the dictionary and to the extent you have used it, but we cannot ask you that. I don't intend to ask you that, but I am instructing you, your verdicts cannot be based on it, and if that changes something, well, that's the way it is, but that's the way it has to be.

(RT 2003.)

At this point, the prosecutor inquired, "You mean [verdicts] cannot be based on it [the dictionary] if it contradicts those

instructions in the jury forms?" The court replied, "If you need a definition of a word, we'll have to look it up for you." (RT 2003.)

Out of the presence of the jury, defense counsel asked the court to ask the jury what use it had made of the dictionary. The court declined to do so. Instead, it told defense counsel that it would admonish the jury "on the proper use of the materials and misuse of materials, and we'll have to wait and see if they arrive at a verdict or verdicts and see what happens then." The court told defense counsel, "You are free to pursue whatever course you wish to, but I'm not going to inquire of the jury the mechanics of how they're deliberating at this point." (RT 2004.)

Counsel did not pursue the matter further and Petitioner argued on appeal that the trial court should have conducted an inquiry into whether any juror had in fact consulted the dictionary. Relying on State law, the California Court of Appeal denied the claim, holding:

> The mere presence of the dictionary in the jury room [] does not establish jury misconduct because the jury had been admonished only the night before not to use a dictionary, and the dictionary was discovered overnight, before deliberations resumed the next day. The record is devoid of affirmative evidence that any juror actually consulted the dictionary, or that it was a juror who brought the dictionary into the room. Thus, the record fails to provide any basis upon which we could evaluate prejudice, if any misconduct in fact occurred. [Citation omitted.] Nor does it contain any information about the specific definitions a juror may have referred to. Without such information, the presumption of prejudice does not arise, and it is impossible to determine whether the definitions may have conflicted with any of the instructions given, or otherwise contributed to a misunderstanding of the applicable legal principles. Appellant suggests that the inadequacy of the record is attributable to the court's

> failure to conduct an inquiry. The court, however, implicitly invited defense counsel to renew his request to conduct an inquiry of the jury once a verdict was reached, by advising counsel that after the verdicts, he could pursue his claim of juror misconduct. Appellant also could have made a record of jury misconduct when he filed his motion for a new trial.

(Opinion of the California Court of Appeal at 18-19.)

In his petition for a writ of habeas corpus to the California Supreme Court, Petitioner recharacterized his claim as one of ineffective assistance of counsel. The California Supreme Court denied the claim without citation or comment.

2. Applicable Federal Law

The Sixth Amendment guarantee of a trial by jury requires the jury verdict to be based on the evidence presented at trial. See Turner v. Louisiana, 379 U.S. 466, 472-73 (1965); Jeffries v. Wood, 114 F. 3d 1484, 1490 (9th Cir.) (en banc), cert. denied, 522 U.S. 1008 (1997). Evidence not presented at trial is deemed "extrinsic." See Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987). Jury exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment. See Lawson v. Borg, 60 F.3d 608, 612 (9th Cir. 1995). However, a petitioner is entitled to habeas relief only if it can be established that the exposure to extrinsic evidence had "substantial and injurious effect or influence in determining the jury's verdict." Sassounian v. Roe, 230 F.3d 1097, 1108 (9th Cir. 2000) (internal quotation marks and citation omitted). A court's curative instructions can weigh in favor of a finding that extrinsic evidence did not affect the verdict. See Jeffries, 114 F.3d at 1491.

3. Analysis

Petitioner and Respondent dispute the nature of the claim before the Court. On appeal Petitioner characterized his claim as one of trial court error for failure to hold an evidentiary hearing on the matter of juror misconduct. In his State habeas petition to the California Supreme Court, Petitioner recharacterized the claim as one of ineffective assistance of counsel. He described his claim as follows:

> Defense counsel was ineffective in the defense of the petitioner when the trial judge told counsel that he was free to pursue what ever course necessary on whether the jury engaged in misconduct by bringing in a dictionary on the last day of deliberations when they were told not to[], in turn was prejudicial to the petitioner since defense counsel choosed not to[].

(State petition at 25 (Resp. Ex. J.).)

In the body of the petition, Petitioner argued that trial counsel was ineffective for failing to seek an interlocutory appeal to compel the trial court to hold an evidentiary hearing. He also argued that he might have been entitled to a new trial if defense counsel "properly performed his duties" or if the trial judge was wrong for not holding a hearing. (Id. at 26-27.)

In his federal petition, Petitioner describes his claim as follows:

> The court should find that the defense counsel for the petitioner was ineffective at trial when the trial judge explained to counsel that he was free to pursue whatever course he (defense counsel) saw fit on whether the jury engaged in misconduct by bringing in a dictionary on the last day of deliberations which in turn denied petitioner the right a fair and impartial trial.

(P&As at 38.) In the body of the petition he argues, "Trial counsel for the defense failed and/or refused to file a writ immediately to the appeals court regarding the dictionary . . . , and "If defense counsel acted properly in performing his duties it is probable that petitioner would have received a new trial . . . Id. at 39.)

Respondent argues that based on Petitioner's allegations to the California Supreme Court this Court is limited to considering whether counsel was ineffective for failing to file an interlocutory appeal challenging the trial court's handling of the juror misconduct issue. In his traverse, Petitioner argues that Respondent has mischaracterized his claim. He states that the basis of his ineffective assistance of counsel claim here and in State court always has been that defense counsel either should have challenged by way of interlocutory appeal the fact that the trial court failed to investigate the juror misconduct claim or should have raised the issue of juror misconduct in a motion for a new trial.

In order properly to exhaust a claim for purposes of federal habeas corpus review, the specific factual basis of the federal claim must be presented to the highest State court. See Kelly v. Small, 315 F.3d 1063, 1067-69 (9th Cir.), cert. denied, 538 U.S. 1042 (2003). New factual allegations in a federal petition do not render a claim unexhausted, however, unless they fundamentally alter the legal claim already considered by the State courts. Belmontes v. Woodford, 350 F.3d 861, 884 (9th Cir. 2003). For purposes of exhaustion, pro se petitions in State court may, and sometimes should, be read differently from counseled petitions, that is, the court may need to be more flexible. See Sanders v. Ryder, 342 F.3d 991, 999 (9th Cir. 2003), cert. denied, 541 U.S. 956 (2004); Peterson v. Lampert, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc). The Court finds that Petitioner sufficiently exhausted the claims that counsel failed to pursue the dictionary claim either during or after the trial.

Petitioner's challenge to counsel's failure to pursue the trial court's refusal to question jurors during trial is meritless because he has not shown that an interlocutory appeal on that issue was a viable remedy under State law. See Rupe v. Wood, 93 F.3d 1434, 1445 (9th. Cir. 1996) (failure to take futile action can never be deficient performance). With respect to counsel's failure to pursue the claim after the trial concluded, the Court is persuaded that the trial court's instructions cured any effect that the jury's use of the dictionary might have had on the verdict. Juries are presumed to follow a court's limiting instructions with respect to the purposes for which evidence may be considered. Aguilar v. Alexander, 125 F.3d 815, 820 (9th Cir. 1997).

Here, just hours before the dictionary was discovered, the court admonished the jury not to look up any words in a dictionary. When the jury returned the next morning the dictionary already had been removed, and before deliberations began the court admonished the jury again that it could not rely on any dictionary definitions it might have considered to reach its verdict "and if that changes something, well, that's the way it is, but that's the way it has to be." (RT 2003.) When the prosecutor then asked for further clarification, the court told the jurors: "If you need a definition of a word, we'll have to look it up for you." (Id.) The jury did not request any definitions from the court and returned its verdict later that day.

The court's curative instructions made clear to the jury that it could not use the dictionary in its deliberations and that it was free to ask the court for clarification of any terms. The proximity of the instructions to discovery of the dictionary further increased their curative effect.

For these reasons, the Court finds that Petitioner fails to establish the ineffective assistance of counsel on these grounds. Accordingly, this claim for relief is DENIED.

B. Failure to Produce Expert Forensic Witness

1. Background

The prosecution presented Mr. Moran, a criminalist for San Mateo County, who testified that he performed a visual examination and collection procedure on a multi-colored shirt worn by Petitioner on the night of the murder. Moran sent the sample to an outside laboratory for examination. The prosecutor asked Moran if he found any gunshot residue on the shirt and Moran stated he had not. The prosecutor then asked:

> If you were to learn that the item the shirt was obtained some two weeks after the person who fired the gun – allegedly – well, the alleged firing of the gun, would you be surprised to find "any gunshot residue?
>
> Moran responded:
>
> After a period of two weeks? I would not be surprised at all not to find something. Even if something even if the garment had been in the vicinity of a firearm. It's not" impossible but I would not be surprised at all. Considering the fragileness of the type of deposit on the garment.

(RT 802.)

Petitioner maintains that defense counsel performed ineffectively by failing to have a defense forensic expert check whether it was indeed unlikely to find no gun powder residue or blood on a shirt if it was examined two weeks after it was worn by the shooter. He argues that with such evidence the jury might have been more likely to believe his version that he was not the actual killer.

Petitioner raised this claim to the California Supreme Court in his State petition for a writ of habeas corpus. The court denied the claim without citation or comment.

2. Applicable Federal Law

Where the evidence does not warrant it, the failure to call an expert does not amount to ineffective assistance of counsel. See Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999). Mere speculation that a witness might have given helpful information if interviewed is not enough to establish ineffective assistance. See Bragg v. Galaza, 242 F.3d 1082, 1087 (9th Cir.), amended, 253 F.3d 1150 (9th Cir. 2001).

3. Analysis

Petitioner speculates that a forensic expert called by the defense would have been able to support his theory about the likelihood of gun residue being found on his shirt. However, he presents no evidence that this is the case. Because mere speculation about the testimony counsel might have been able to obtain from an unidentified expert witness does not establish ineffective assistance of counsel, this claim for relief is DENIED.

C. Failure To Challenge Blood Splatter Testimony.

1. Background

Petitioner argues that evidence of blood splatter found on the victim's hands was relevant to the question of the comparative heights of the shooter and the victim and that counsel's failure to pursue inconsistencies in testimony about the blood splatter, was prejudicial to his attempt to show that he was not the shooter. Petitioner relies on the following in support of his argument:

The State's forensic pathologist, Dr. Ferrer, performed an autopsy on the victim on May 24, 1992. In the autopsy report Ferrer wrote: "No blood splatters are noted on the hands. . . ."

(P&As at 78 (Ex. G).) At trial, Dr. Ferrer testified that "on the left hand of the victim . . . second and thumb area . . . I noticed there was some tiny droplets of blood. . . . [¶] We call this blood splatter . . ." (RT 335.)

Dave Cammack, the Chief Investigator for the San Mateo County Coroner's Office, wrote a report stating that he went to the crime scene at 7:30 a.m. on May 24, 1992, and found blood splatter on the back of the victim's right hand. (P&As at 87 (Ex. G).)

Petitioner also notes that: (1) a juror asked whether the gunman "would be taller or shorter or the same height as the victim," (RT 339) (2) the victim stood 5' 10" tall and Petitioner was 5'5" tall, and (3) Dr. Ferrer agreed with the prosecutor's statement that the path of the bullet into the victim was "basically a level entry . . . perpendicular to the floor." (RT 331.)

The thrust of Petitioner's argument appears to be that he was too short to have shot the bullet both perpendicular to the floor and into the face of a person five inches taller than he was Petitioner's counsel did not cross-examine Dr. Ferrer on his inconsistent statements and did not bring Cammack's report to the attention of the court or Petitioner or call Cammack aq a witness.

The California Supreme Court denied this claim on habeas corpus review without citation or comment.

2. Applicable Federal Law

A difference of opinion as to trial tactics does not constitute the denial of effective assistance of counsel. See United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981). In order to establish deficient performance by counsel the petitioner must show that counsel's representation fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 688. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable.

See Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). In order to establish prejudice the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

3. Analysis

Petitioner has failed to establish a reasonable probability that the result of the proceeding would have been different if counsel had explored the conflicts in the blood splatter evidence. With respect to determining the comparative heights of the victim and the shooter, Dr. Ferrer testified that he did not know the height of the assailant. When the prosecutor asked, "Would you say it's hard to say exactly what the height and weight of the assailant is in relation to the victim, because of the variable of bend and the variables that naturally occur when the body moves?" he answered, "That's correct." (RT 341.) Petitioner has produced no evidence to suggest that cross-examination on this issue by counsel would have provided any further clarification about the relative heights of the victim and the shooter. Moreover, because the jury's verdicts indicate that it found Petitioner guilty as an aider and abettor and not as the shooter, Petitioner cannot demonstrate that it would have mattered had the defense explored any more thoroughly the issue of who the shooter was. Cf. United States v. Gibson, 690 F.2d 697, 703-04 (9th Cir. 1982) (failure "to make evidentiary objections does not render assistance ineffective unless challenged errors can be shown to have prejudiced the defense).

The Court finds that counsel's failure to pursue these inconsistencies in testimony did not amount to ineffective assistance or cause prejudice. Accordingly, this claim for relief is DENIED.

CONCLUSION

For the foregoing reasons, the Court concludes that Petitioner is entitled to habeas corpus relief on his claim of instructional error. Accordingly, the Court GRANTS the writ with respect to this claim. Within ninety days of the date of this Order, the State shall retry Petitioner on the murder charge or vacate his sentence on that conviction and arrange for him to be sentenced on the robbery and auto theft convictions. All other claims for relief are DENIED. Should the State appeal the Court's decision, the Court will appoint counsel to represent Petitioner on appeal.

The Clerk of the Court shall send a copy of this Order to Petitioner, Respondent, and Respondent's counsel, and to Petitioner's State appellate counsel, C. Elliot Kessler, 555 Bryant Street #296, Palo Alto, California, 94301. The Clerk of the Court shall enter judgment. and close the file.

IT IS SO ORDERED,

DATED: **MAR 24, 2005**

/s/ _____
CLAUDIA WILKIN
United States District Judge

FILED April 21, 2005
Richard W. Wieking, Clerk, U. S. District Court
Northern District of California
Oakland

IN THE UNITED STATE DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ROBERT PULIDO,	
	No. C 99-4933 CW (PR)
Petitioner,	
v.	ORDER DENYING
	MOTION TO ALTER
ANTHONY LAMARQUE, Warden,	JUDGMENT
Respondent.	(Docket no. 22)

On March 24, 2005, the Court granted the petition for a writ of habeas corpus with respect to Petitioner's instructional error claim, denied all of Petitioner's other claims, and ordered the State to retry Petitioner on the murder charge within ninety days or vacate his sentence on that conviction and arrange for him to be sentenced on the robbery and auto theft convictions. (Docket no. 20.) On April 4, 2005, Respondent filed a Motion to Alter Judgment under Rule 59(e) of the Federal Rules of Procedure. In that motion, Respondent asserts that this Court incorrectly found that the California Supreme Court's decision was contrary to clearly established federal law because it misapplied the "contrary to" rule, and that the Court erred in concluding that the California Supreme Court unreasonably applied the Chapman v. California, 386 U.S. 18 (1967), harmless error test.

A motion to alter or amend judgment under Rule 59 must

be made within ten days of entry of judgment. See Fed. R. Civ. P. 59(e). A Rule 59(e) motion "'should not be granted, absent highly unusual circumstances, unless he district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the law.'" McDowell v. Calderon, 197 F.3D 1253, 1255 (9th Cir. 1999) (en banc) (citation omitted), cert. denied, 529 U.S. 1082 (2000). Where new evidence or a change in the law is not at issue, only clear error warrants relief under Rule 59(e). See id. at 1255 n. 4 (emphasis in original). Motions for reconsideration should not be frequently made or freely granted; they are not a substitute for appear or a means of attacking some perceived error of the court. See Twentieth Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir. 1981).

Respondent has not presented newly discovered evidence or shown that there has been an intervening change in the law since the Court issued its Order. Therefore, reconsideration will be granted only if the Court's ruling was clearly erroneous. The clear error standard requires a "definite and firm conviction that a mistake has been committed." See Easley v. Cromartie, 532 U.S. 234, 242 (2001). A district court does to commit clear error warranting reconsideration when the question before it is a debatable one. (See McDowell, 197 F.3d at 1256 (district court did not abuse its discretion in denying reconsideration where question whether it could enter protective order in habeas action limiting Attorney General's use of documents from trial counsel's file was debatable).

None of Respondent's arguments establishes that the Court's decision amounted to clear error. Rather, they highlight the debatable nature of the questions at issue. The Court finds no grounds upon which to alter its judgment. Accordingly, Respondent's Rule 59(e) motion is DENIED.

The Clerk of the Court shall send a copy of this Order to all parties who were served with the Order granting the petition.

IT IS SO ORDERED.

DATED: April 2, 2005

/s/_____
CLAUDIA WILKIN
United States District Judge

Filed 05/29/1997

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent, S053965

v.

Ct. App. 1/1 A065850

MICHAEL ROBERT PULIDO,

San Mateo

Defendant and Appellant. Super. Ct. No. SC29805

Penal Code section 189[1] provides that any killing committed in the perpetration of specified felonies, including robbery, is first degree murder. Under long-established rules of criminal complicity, liability for such a murder extends to all persons "jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery" (*People* v. *Martin* (1938) 12 Cal.2d 466, 472) "when one of them kills while acting in furtherance of the common design." (*People* v. *Washington* (1965) 62 Cal.2d 777, 782.)

In this case, we address a question regarding the scope of complicity in robbery murder. If one person, acting alone, kills in the perpetration of a robbery, and another person *thereafter* aids and abets the robber in the asportation and securing of the property taken, is the second person guilty of first degree murder under section 189? We conclude the answer is no. Although the second person is an accomplice to robbery (*People* v. *Cooper* (1991) 53 Cal.3d 1158, 1165), such participation in the

---

1. All further unspecified statutory references are to the Penal Code.

robbery does not subject the accomplice to murder liability under section 189, because the killer and accomplice were not "jointly engaged at the time of such killing" in a robbery (*People* v. *Martin*, *supra*, 12 Cal.2d at p. 472); the killer, in other words, was not acting, at the time of the killing, in furtherance of a "common" design to rob (*People* v. *Washington*, *supra*, 62 Cal.2d at p. 782.)

In the present case the jury was not instructed on the above principle. The lack of such instructions does not, however, require reversal; the omitted issue was resolved adversely to defendant under other, properly given instructions. (*People* v. *Sedeno* (1974) 10 Cal.3d 703, 721, overruled on other grounds in *People* v. *Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; see also *People* v. *Guiton* (1993) 4 Cal.4th 1116, 1130.) We will therefore affirm the judgment of the Court of Appeal, which affirmed defendant's conviction for first degree murder.

FACTUAL AND PROCEDURAL BACKGROUND

Sometime between 1 a.m. and 5:30 a.m. on May 24, 1992, Ramon Flores, the cashier at a Shell gas station in San Mateo, was shot in the head with a single .45-caliber bullet, killing him within seconds. A neighbor heard a loud bang coming from the direction of the gas station around 3:45 a.m., then a voice yelling; he could not distinguish words, but told a police detective it sounded like the person was addressing someone else. A cash register taken from the store was found the next morning in some roadside bushes elsewhere in San Mateo. Defendant's fingerprints were on the cash register, as well as on an unopened can of Coke found on the store counter. No fingerprints of Michael Aragon, who defendant testified committed the killing, were identified on either the can or the register.

Arrested on an unrelated auto theft charge, defendant volunteered that he had information about the Shell station

robbery. He led police to a location where they found discarded, unused .45-caliber cartridges, which bore ejection markings resembling those on a cartridge found on the gas station floor. Defendant made a series of inconsistent exculpatory statements to police, blaming the robbery and killing successively on a man named Carlos Vasquez, on a relative of defendant's named Eduardo Alarcon and, finally on an unidentified Tongan man. In a telephone conversation from jail with his uncle, Michael Aragon, and Aragon's cohabitant, Laura Moore, however, defendant said he was alone during the robbery.

At the time of the killing, defendant was staying with Aragon, Moore and their children in their San Mateo home. While he was staying with them, Aragon, two of the children, and a neighbor saw defendant with a pistol, which the neighbor identified as a .45 Colt. During that time, defendant twice observed that the nearby Shell station would be easy to rob because the attendant was always asleep. Aragon told defendant to get rid of the gun because he, Aragon, was on probation. He had been convicted in 1989 of burglary, possession of cocaine and contributing to the delinquency of a minor.

Aragon and Moore testified that defendant was at home when they went to bed around midnight on May 23, but was gone when they got up at around 3 a.m. to care for their baby. The next morning, Sunday, May 24, they awoke to find defendant asleep in the living room with his clothes and shoes on. He showed Aragon his wallet and said, "Look unc, almost all ones." Later that day, Moore discovered defendant was carrying a handgun and insisted he and Aragon dispose of it. At her direction, defendant took the gun apart; Moore then boiled the pieces in soapy water and put most of them in a bag, which defendant and Aragon threw away near
Candlestick Park. Two pieces that Moore had retained to prevent reassembly were later given to police and identified as fitting a .45-caliber Colt.

After seeing a newspaper article about the killing, Aragon asked defendant if he committed it. Defendant denied he had, but a few days later, when Aragon asked again, defendant admitted the crime. He told Aragon he bought a Coke, then shot Flores in the face, took the register and later threw it in some bushes. In a letter from jail, however, defendant wrote to Moore, "If Michael is reading this, tell him I didn't kill that guy, I was just messing with him."

Defendant testified, blaming Aragon for the killing. Aragon, he stated, had seen where defendant kept the pistol. On the night of May 23, defendant and Aragon went out in Aragon's car; defendant thought the pistol was on the shelf where he usually kept it. They went to Hunter's Point, where Aragon bought and smoked some cocaine. They left, but returned later for Aragon to buy and smoke more cocaine. Eventually the two arrived at the Shell station in San Mateo. Aragon went inside, defendant thought for matches or cigarettes. Defendant waited outside. He heard a gunshot and ran into the store. Aragon was holding defendant's gun. Flores was lying on the floor, bleeding from a large bullet wound in his face. Defendant yelled at his uncle, ran out of the store and got in the passenger seat of the car. A few seconds later, Aragon came out, holding the cash register in his left hand and the gun in his right hand. He threw the register on defendant's lap and drove away.

As they were driving away from the scene, Aragon told defendant to open the register. When defendant did not comply, Aragon pointed the gun at him and insisted. Defendant got a screwdriver from the back of the car and pried the register open. At Aragon's command defendant gave him the money and dumped the register in some bushes by the side of the road. Defendant denied touching a Coke can in the store that night; he suggested he might have touched the can on some earlier occasion when he bought a drink at the store.

The defense also presented evidence casting doubt on

Aragon's credibility. While admitting a prior drug possession conviction, Aragon denied he was still using cocaine at the time of the killing. However, Aragon's sister (defendant's aunt) testified he came to her house on Sunday, May 24 or Monday, May 25, at which time he was "on something," but did not smell of alcohol. Her son described Aragon as acting paranoid and smelling of crack cocaine. The sister opined Aragon was a liar and a thief. A police detective testified that, when first interviewed, Aragon said he had gotten up at 12:15 a.m. Sunday to take care of the baby, When Aragon and Moore were later interviewed together at the police station, both said it was around 3 a.m. During a discussion about the time period in which the killing occurred, Aragon said to Moore, "That's when I was with you, remember?"

The jury convicted defendant of robbery and first degree murder, and found true a robbery-murder special-circumstance allegation. (§§ 211, 187, 189, 190.2, subd. (a)(17)(A).) The jury was unable to reach a verdict on allegations of personal gun use and person infliction of great bodily injury. (§§ 1203.075, 12022.5, subd. (a).) Defendant was sentenced to a life term without the possibility of parole.

The Court of Appeal affirmed the murder conviction and sentence. The court rejected defendant's contention, based on *People* v. *Esquivel* (1994) 28 Cal.App.4th 1386 (hereafter *Esquivel*), that the trial court should, sua sponte, have instructed the jury defendant was not liable for the murder if he formed the intent to aid and abet the robbery only after Flores was killed. The Court of Appeal reasoned that because one who intentionally assists a robber in the asportation of the stolen property is, under *People* v. *Cooper*, *supra*, 53 Cal.3d 1158, guilty of robbery, and because a killing in the commission of robbery is first degree murder under section 189, "it is unnecessary for the jury to determine whether the intent to aid and abet the underlying felony preceded the killing." We granted review to resolve the conflict between the lower court's

decision and that in *Esquivel*.

I.

Although this court has never decided the precise question before us, we have on many occasions discussed the scope of a robber or other felon's liability for a killing committed by a confederate. As shown below, our descriptions of an accomplice's liability have limited complicity to killings occurring while the killer was acting in furtherance of a criminal purpose common to himself and the accomplice, or while the killer and accomplice were jointly engaged in the felonious enterprise. The only previous decision on this question by a Court of Appeal also held robbery murder complicity to be so limited. (*Edquivel, supra*, 28 Cal.App.4th at pp. 1394-1397; accord, *Com.* v. *Waters* (Pa. 1980) 418 A.2d 312, 318 ["the *common design* to commit the felony must exist when the act of slaying occurs in order to establish an accomplice's liability for felony-murder" (italics in original)]; see also *People* v. *Asher* (1969) 273 Cal.App.2d 876, 890 and fn. 2 [approving instruction that to convict accomplices of murder, jury must find they "'either conspired to rob, or aided, abetted or participated in the robbery prior to the time the fatal shot was filed'"].)

At the outset, it should be emphasized we are not concerned here with the part of the felony murder rule making a killer liable for first degree murder if the homicide is committed in the perpetration of robbery. This case involves only the question of a *non-killer's* liability for the felony murder committed by another. We are concerned, in other words, not with the felony murder rule's "aggravation of culpability aspect," but with its "complicity aspect." (Robinson, *Imputed Criminal Liability* (1984) 93 Yale L.J. 609, 618, fn.25.)

Our earliest statement of the complicity of one robber in a murder committed by another appears to have been in *People* v.

Vasquez (1875) 49 Cal.560 (hereafter *Vasquez*). A man had been shot to death during the robbery of a store. Vasquez admitted his participation in the robbery, but testified the shot had been fired by another of the robbers, without Vasquez's approval or assistance. On appeal from his first degree murder conviction, Vasquez complained of the following jury instruction: "'It is no defense to a party associated with others in, and engaged in a robbery, that he did not propose or intend to take life in its perpetration, or that he forbade his associates to kill, or that he disapproved or regretted that any person was thus slain by his associates. If the homicide in question was committed by one of his associates engaged in the robbery, in furtherance of their common purpose to rob, he is as accountable as though his own hand had intentionally given the fatal blow, and is guilty of murder in the first degree.'" (*Id.* at pp. 562-563.) We held the instruction accurately stated the law under section 189, although we declined to elaborate, observing merely that "no argument is required to sustain it, as a clear and correct statement of the law on that point." (*Id.* at p. 563; accord, *People* v. *Lawrence* (1904) 143 Cal. 148, 157 [*Vasquez* instructions correctly states "the rule of absolute responsibility of a party for a homicide committed by his associates in furtherance of their common purpose to rob."].)

In another early case, *People* v. *Olsen* (1889) 80 Cal.122 (hereafter *Olsen*), overruled on other grounds in *People* v. *Green* (1956) 47 Cal.2d 209, 227, 232, we approved an instruction that, while similar to the Vasquez instruction, was more general in not being limited to robberies: "'If a number of persons conspire together to commit a felony, and take the life of another person in the prosecution of the common design, it is murder in all, although only one may have inflicted the fatal blow, the others being present aiding and abetting.'" (*Id.* at p. 124.) Defendant complained the instruction failed to inform the jury the killing must have been the "ordinary and probable effect" of the felonious scheme, and not a "fresh and

independent product" of the killer's mind. (*Id.* at p. 125.) Rejecting this argument, we held the instruction, by limiting complicity to a killing committed "*in the prosecution of the common design*," adequately excluded killings foreign to the contemplated crime or crimes. (*Ibid.*, italics in original.)

In *People* v. *Washington*, *supra*, 62 Cal.2d 777 (hereafter *Washington*), we examined the scope of section 189's robbery-murder with some care, ultimately holding the rule did not apply to a killing committed by someone other than the robber or robbers. (*Id.* at p. 783.) In *Washington*, we described a robber's complicity as follows: "A defendant need not do the killing himself, however, to be guilty of murder. He may be vicariously responsible under the rules defining principals and criminal conspiracies. All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design." (*Id.* at pp. 781-782.)

Other post-*Vasquez* descriptions of complicity in robbery murder under section 189 are worded in a rather different manner. In both *People* v. *Perry* (1925) 195 Cal. 623, 637-638 (hereafter *Perry*) and *People* v. *Martin*, *supra*, 12 Cal.2d at page 472 (hereafter *Martin*), we stated the rule as follows: "[I]f a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery, whether such killing is intentional or unintentional, or accidental, each and all of such persons so jointly engaged in the perpetration of, or attempt to perpetrate such crime of robbery, are guilty of murder of the first degree." (Accord, *People* v. *Waller* (1939) 14 Cal.2d 693, 703; *People* v. *Hutchinson* (1967) 254 Cal.App.2d 32, 38-39; *People* v. *Ray* (1962) 210 Cal.App.2d 697, 700.) This formulation, unlike the *Vasquez* instruction, does not require that the killing have been "in furtherance of the common purpose to rob," although it does require the killer and accomplice be jointly engaged, at the time of the killing, in a

robbery.

As this review demonstrates, our formulations of the rule establishing complicity of one robber in another robber's homicidal act have varied in their precise language and perhaps in the exact scope of complicity intended. One line of cases echoes, verbatim or with relatively minor variation, the *Vasquez* formulation—the killing must be committed "in furtherance of their common purpose to rob." (*Vasquez*, *supra*, 49 Cal. at p. 563; see *Washington*, *supra*, 62 Cal.2d at p. 783 [killing "must have been committed by the defendant or by his accomplice acting in furtherance of their common design"]; *Olsen*, *supra*, 80 Cal. at p. 124 [complicity for killing committed "in the prosecution of the common design."].) *Martin* and *Perry*, on the other hand, appear to state a broader rule of felony-murder complicity, under which the killing need have no particular causal or logical relationship to the common scheme of robbery; accomplice liability attaches, instead, for any killing committed while the accomplice and killer are "jointly engaged" in the robbery. (See also *Perry*, *supra*, 195 Cal. at p. 638 [*robbery*, rather than *killing*, must be "in furtherance of a common purpose"]; *People* v. *Waller*, *supra*, 14 Cal.2d at p. 703 [same].) One lower court had explicitly distinguished the two complicity rules, holding that, regardless of the lack of a causal link between robbery and killing, accomplice liability for felony murder is established, as in *Martin* and *Perry*, whenever "the killing is done *during* the perpetration of a robbery in which they were participating." (*People* v. *Cabaltero* (1939) 31 Cal.App.2d 52, 61, italics added (hereafter *Calbaltero*).)[2/]

---

2. In *Cabaltero*, the defendant was a participant in a robbery in the course of which another of the robbers impulsively shot and killed a third member of the group, angry at the third man's having fired his own gun at some witnesses. (*Cabaltero*, *supra*, 31 Cal.App.2d at pp. 55-56.) The Court of Appeal held the evidence supported murder convictions for all the conspirators, whether or not the killing was in furtherance of the common design, because the killing was committed by one of the conspirators during

Under *neither* of the approaches described above, however, does complicity in a felony murder extend to one who joins the felonious enterprise after the killing has been completed. An accomplice's liability for any homicide committed in furtherance of a "common purpose" (*Vasquez*, *supra*, 49 Cal. at p. 563) or "common design" (*Washington*, *supra*, 62 Cal.2d at p. 783) of robbery patently does not include a killing that preceded any agreement or intent to participate in the robbery, because the killer was not then acting in pursuit of any such common design or purpose. Even under the arguably broader complicity rule represented by *Martin*, *Perry*, and *Cabaltero*, liability does not extend to a homicide completed before the accomplice's participation in the robbery began, because the killer and accomplice were not "jointly engaged at the time of such killing" (*Martin*, *supra*, 12 Cal.2d at p. 472) in robbery, attempted robbery or escape from a robbery. (See also *Cabaltero*, *supra*, 31 Cal.App.2d at p. 61 [conspirators responsible for killing that occurred during robbery in which they "were participating"].) Our cases establishing the complicity of a non-killer in a felony under have thus uniformly required, at a minimum, that the accomplice have been, at the time of the killing, a conspirator or aider and abettor in the felony.

The Court of Appeal, holding to the contrary, relied heavily

---

the robbery. (*Id.* at pp. 61-62.) The *Cabaltero* rationale has been criticized by commentators as substituting the "mere coincidence of time and place" for what should be required causal relationship between planned felony and killing. (2 LaFave and Scott, Substantive Criminal Law (1986) § 7.5, p. 212; Morris, *The Felon's Responsibility for the Lethal Acts of Others* (1956) 105 U.Pa.L.Rev. 50, 73 ["There is little to be said in favor of this decision. Applying the express *ratio* of *Cabaltero*, if one of two burglars ransacking a home glances out the window, sees his enemy for whom he has long been searching and shoots him, the unarmed accomplice, party only to the burglary, will be guilty for murder in the first degree."]; see also *Com.* v. *Waters* , *supra*, 418 A.2d at ppl 316-318 [rejecting purely temporal rule for felony-murder complicity in favor of one requiring killing be "in furtherance of" the felony].)

on *People* v. *Cooper*, *supra*, 53 Cal.3d 1158 (hereafter *Cooper*), in which we addressed the duration of the robbery for purposes of aiding and abetting. We held that the asportation element of robbery, although *satisfied* by slight movement, continues until the loot has been carried away to a place of temporary safety. A person therefore commits robbery as an aider and abettor if, all other elements being also satisfied, the person "form[s] the intent to facilitate or encourage commission of the robbery *prior to or during the carrying away of the loot to a place of temporary safety*." (*Id.* at p. 1165, italics in original, fn. omitted.) Although *Cooper* briefly discussed the "escape rule" applicable to robbery for purposes of felony murder (*id.* at pp. 1166-1167),[3] the majority there had no occasion to address, and did not address, any question regarding one robber's complicity in the homicidal act of another. Indeed, in *People* v. *Montoya* (1994) 7 Cal.4th 1027, where we followed *Cooper* to reach a similar conclusion as to the duration of burglary for aiding and abetting purposes, we expressly limited our holding to complicity in the burglary itself, reserving the issue of "an aider and abettor's liability for murder upon a theory of felony murder in which the underlying felony is burglary." (*Id.* at p. 1046, fn. 9.)

In addition to *Cooper*, the Attorney General relies on our past statements that section 189 itself requires no "strict 'causal' [citation] or 'temporal' [citation] relationship between the 'felony' and the 'murder.'" (*People* v. Berryman (1993) 6. Cal.4th 1048, 1085.) "All that is demanded is that the two 'are parts of one continuous transaction.'" (*Ibid.*) That principle is correct, but inapposite. That the killing in this case was committed in "the perpetration of . . . robbery" (§ 189) and thus constitutes first degree murder on the part of the killer, is beyond question. The robbery and homicide were clearly parts

---

3. A killing committed by a robber during his or her flight from the scene of the crime, and before reaching a place of temporary saf ety, comes within section 189. (*People* v. *Salas* (1972) 7 Cal.3d 812, 820-824.)

of one continuous transaction, bringing into unchallenged operation the felony-murder rule's *aggravation of culpability* aspect; the only question here, as noted earlier, is the proper scope of the rule's *complicity* aspect. As we have seen, an accomplice's complicity under the California felony-murder rule, as it has been understood until now, does not extend to killings committed before the accomplice joined the felonious enterprise.[4]

The parties' remaining arguments, which concern the purposes of the felony-murder rule and the consistency of the rules the parties propose with other principles of criminal law, may be taken as arguments for and against *extending* the felony-murder rule's complicity aspect beyond its current scope. As the Attorney General points out, we are not concerned here with the wisdom of the first degree felony-murder rule itself, or with the criticisms—and defenses—directed at it by judicial and academic commentators; section 189 is the law of California, and we are not free to ignore or alter it if we would. Nevertheless, when the rule as ordained by the Legislature requires detailed delineation, this court properly considers policy and consistency. In particular, we have held the first degree felony-murder rule "should not be extended beyond any rational function that it is designed to serve." (*Washington*, *supra*, 62 Cal.2d at p. 783.)

Defendant argues the Attorney General's proposed extension of an accomplice's felony-murder complicity would be inconsistent with the rule that a conspirator is not, simply by

---

4. The Attorney General's reliance on the "continuous transaction" rule is also misplaced because that rule has long been subject to the qualification that the killer's felonious intent must be formed no later than the acts leading to death. (*People* v. *Ainsworth* (1988) 45 Cal.3d 984, 1016; *People* v. *Jeter* (1964) 60 Cal.2d 671, 676-677.) Even if the "continuous transaction" rule governed complicity as well as aggravation of culpability, therefore, it would not support felony-murder liability for a late-joining accomplice.

membership in the conspiracy, made liable for a substantive offense committed pursuant to the conspiracy *before* he or she joined the conspiracy. (*People* v. *Marks* (1988) 45 Cal.3d 1335, 1345; *People* v. *Weiss* (1958) 50 Cal.2d 535, 564-565.) The court in *Esquivel* relied in part on the same reasoning. (*Esquivel*, *supra*, 28 Cal.App.4th at pp. 1395-1396.)

We agree extension of felony-murder complicity to late-joining aiders and abettors would create an inconsistency between aiding and abetting liability and that of conspirators, where no such conflict now exists. For purposes of complicity in a cofelon's homicidal act, "[t]he conspirator and the abettor stand in the same position." (*People* v. *Ellenberg* (1958) 165 Cal.App.2d 495, 500.) In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). (See *Vasquez*, *supra*, 49 Cal. at p. 563 [referring to group of "associates" committing robbery]; *Olsen*, *supra*, 80 Cal. at p. 125 [referring to "conspiracy" to commit felony, with murder committed by one member, "the others being present aiding and abetting" (italics omitted)]; *Perry*, *supra*, 195 Cal. at p. 638 ["confederates" in robbery]; *Martin*, *supra*, 12 Cal.2d at p. 472 [those "jointly engaged" in robbery].) The Attorney General correctly observes that "the law of conspiracy cannot be automatically analogized to the law of aiding and abetting," but does not explain why the differences between these two species of complicity (chiefly the existence or nonexistence of an agreement) should affect the liability of a late joiner for a homicide committed by others in the criminal enterprise before his or her joinder.

In addition, our holding that conspirators are not liable for substantive crimes committed before their entry into the conspiracy (*People* v. *Weiss*, *supra*, 50 Cal.2d at p. 564) was based on section 31, which defines as principals all persons

"concerned" in the commission of a crime. Citing section 31, the *Weiss* court observed that "[m]anifestly, a conspirator is not 'concerned' in the commission of a crime which was committed before he joined the conspiracy." (50 Cal.2d at p. 564.) Section 31 also provides the basis for punishing aiders and abettors as principals; how such a person is "concerned" in a homicide that was completed before he joined in the criminal enterprise that led to it is equally difficult to see.

On a related point, defendant persuasively argues extension of the felony murder rule's complicity aspect to late joiners would not serve the rule's primary purpose, "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." (*Washington*, *supra*, 62 Cal.2d at p. 781; accord, *People* v. *Hansen* (1994) 9 Cal.4th 300, 310.) Justice Tobriner, while serving on the Court of Appeal, made this point in a case applying the rule of *People* v. *Weiss*, *supra*: "If, as wise commentators have suggested (see, for instance, Holmes, The Common Law (1881), p. 46), the mainspring of criminal sanction lies in its force as a deterrent, the sanction can hardly be applied retroactively by use of the conspiracy doctrine." (*People* v. *Feldman* (1959) 171 Cal.App.2d 15, 21.) The reasoning is as valid for aiders and abettors as for conspirators. "In either instance, the defendant's late joinder does not aid or encourage the commission of the homicide" (*Esquivel*, *supra*, 28 Cal.App.4th at p. 1396); in either instance, punishing late joiners for earlier homicides committed by others will not deter the negligent or accidental commission of such homicides.

The Attorney General responds that imposing murder liability on late joiners would, at least, tend to deter such joinder. Leaving aside that we have previously denied section 189 was intended to deter the commission of the underlying felonies themselves (*Washington*, *supra*, 62 Cal.2d at p. 781), one would have to question the proportionality of a rule imposing first degree murder liability on a person for a homicide

causally unrelated to any of his own acts, and which he is powerless to undo, in order to deter him from assisting the robber-killer in taking away the loot. Section 189 does not demand the imposition of such retroactive liability, either by its terms or by incorporation of common law principles of criminal liability. Indeed, "[t]o convict on this basis would be to establish criminal guilt by ratification, which is not a criminal-law doctrine." (Perkins, *The Act of One Conspirator* (1974) 26 Hastings L.J. 337, 344, 345.)

For these reasons, we decline to extend our interpretation of section 189's first degree felony-murder rule to include aiders and abettors or conspirators who join the felonious enterprise only after the murder had been completed.

II.

Having set forth the applicable legal principles, we turn now to consideration of whether, in the case at bar, any prejudicial instructional error occurred.

Defendant would have us find reversible error in the trial court's failure to instruct that "a felony murder verdict could be based on an aiding and abetting theory only if [defendant] aided and abetted the robbery before the infliction of the fatal wound." (Defendant requested or proposed no such instruction at trial.) In response, the Attorney General argues the court had no sua sponte duty to instruct on the nonliability for the felony murder of late-joining aiders and abettors to robbery because no such general principle of law had, at the time of this trial, been articulated by an appellate court or embodies in a standardized instruction. (See *People* v. *Flannel*, *supra*, 25 Cal.3d at pp. 672, 681-682.) In addition, the Attorney General argues, the factual predicate for a sua sponte instructional obligation was absent, as the defense relied primarily on defendant's claims he assisted Aragon only under duress or after reaching a place of temporary safety, rather than on any

evidence defendant intentionally assisted only during asportation, after the killing.

We need not decide whether the trial court in this case had any sua sponte duty to instruct on the nonliability of late joiners, because defendant cannot demonstrate prejudice from the asserted instructional error: "the factual question posed by the omitted instruction was necessarily resolved adversely to defendant under other, properly given instructions." (*People* v. *Sedeno*, *supra*, 10 Cal.3d at p. 721.) Specifically, the jury was instructed that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery *at the time of the killing*. In a modified form of CALJIC No. 8.80.1 (1990 new), drawn directly from the statutory language defining the special circumstance (§ 190.2, subd. (a)(17)), the jury was directed to determine whether or not "the murder was committed *while the defendant was engaged or was an accomplice in*" robbery, attempted robbery or the immediate flight from a robbery. In the special circumstance verdict, consistently with this instruction, the jury found "that the said defendant, Michael Robert Pulido, engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission of crime charged in count 1* [murder]." By its special circumstance verdict the jury thus found—explicitly, unanimously and necessarily—that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores.

Defendant argues the special circumstance finding is not dispositive because, under another portion of CALJIC No. 8.80.1, the jury could have based its finding on defendant's being a "major participant" in the robbery and acting with "reckless indifference to human life." Such a finding, defendant asserts, could in turn have rested on defendant's assisting Aragon after the killing instead of seeking help for Flores. We disagree. Post-killing assistance to Aragon, by itself, could not

have been the basis for the jury's explicit finding defendant "engaged in or was an accomplice in the commission of or attempted commission of robbery *during* the commission of [murder]," nor could it have satisfied the instructional requirement that "the murder was committed *while* the defendant was engaged or was an accomplice in" robbery. The special circumstance finding thus demonstrates the jury did not accept the theory defendant joined the robbery only after Flores was killed. Any error in the failure specially to instruct on this issue was harmless.

For the same reason, no prejudice could have arisen from the instructions actually given on duration of robbery and liability of accomplices for first degree felony murder. Defendant contends these instructions permitted the jury to convict him of murder on the legally inadequate ground that he assisted Aragon in taking away the robbery loot. An instructional error presenting the jury with a legally invalid theory of guilt does not require reversal, however, if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory. (*People* v. *Guiton*, *supra*, 4 Cal.4th at p. 1130.) As shown above, the jury's true finding on the robbery-murder special circumstance so demonstrates.

For the purpose of guidance in future cases, however, we briefly discuss the standard instructions pertinent to this issue. CALJIC No. 8.27 (1996 bound vol.) states: "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of ____, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental." CALJIC No. 9.40.1 (1996 bound vol.), based on our

holding in *Cooper*, tells the jury that, "[f]or the purposes of determining whether a person is guilty as an aider and abettor to robbery," the robbery continues so long as the stolen property is being carried away to a place of temporary safety. CALJIC No. 8.21.1 (1996 bound vol.) states that, "[f]or the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery," the crime is still in progress so long as the "perpetrator" is fleeing in possession of the stolen property and has not reached a place of temporary safety.[5]

These standard instructions are correct in general; when, however, substantial evidence would permit the jury to find the defendant began aiding and abetting an enumerated felony only after the killing occurred, they may require modification, or qualification with a special instruction. Unmodified, CALJIC No. 8.27 appears to tell the jury that an aider and abettor in an enumerated felony, without any temporal or causal qualification, is liable for first degree murder in a killing committed by anyone else engaged in the felony. In combination with the *Cooper* instruction concerning the duration of a robbery (CALJIC No. 9.40.1), CALJIC No. 8.27 could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is

---

5. CALJIC No. 8.27 was given in this case over defense objection. The unsuccessful objection rested on the defense claim the evidence did not support an aiding and abetting theory because any assistance defendant offered Aragon was given under duress or after the two had reached a place of temporary safety. CALJIC Nos. 9.40.1 and 8.21.1 (then No. 9.44) were, without objection, also given, as was, *at defense request*, a special instruction stating, in pertinent part: "For purposes of determining whether the defendant is guilty of robbery felony murder the robbery continues until the robber has reached a position of temporary safety, with or without the stolen property." The special instruction was defective in that it invited the jury to find "defendant" committed "robbery felony murder" if he participated in the robbery at some time before the robbers reached a position of temporary safety.

complete, is nonetheless guilty of first degree murder under the felony-murder rule. As we have seen, that implication would be incorrect.

CALJIC No. 8.27 appears, from the language of its first phrase, to have been drawn in part from the *Martin/Perry* formulation of accomplice liability for felony murder. However, where *Martin* and *Perry* referred to "any one of several persons *jointly* engaged *at the time of such killing* in perpetration of or an attempt to perpetrate" robbery (see p. 8, *ante*), the instruction refers merely to "any one of several persons engaged in the commission or attempted commission" of the specified felony, omitting the language italicized above. Similarly, where the *Martin/Perry* formulation assigns guilt of felony murder to "each and all of *such persons jointly engaged*" in the robbery, the instruction assigns such guilt to "all persons, who either actively commit the act constituting that crime" (the specified felony) or who intentionally aid and abet the perpetrator of the felony. The italicized phrase in *Martin* and *Perry*, by referring back to "such" persons jointly engaged, again makes clear that felony-murder liability attaches only to those engaged in the felonious scheme before or during the killing.[6]

One proper manner of modifying CALJIC No. 8.27 to limit the liability of late joiners, therefore, would be to insert in the instruction the following italicized phrase: "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of ____, all

---

6. The predecessor to CALJIC No. 8.27, CALJIC No. 317 (1946 bound vol.), was more complete in this respect. It read: "If a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of, or attempt to perpetrate, the crime of arson, rape, robbery, burglary, or mayhem, and if the killing is done in furtherance of the common design or is an ordinary and probable effect of the pursuit of that design, all such persons so jointly engaged are guilty of murder of the first degree, and this is the law whether such killing be intentional, unintentional, or accidental."

persons, who either directly and actively commit the act constituting that crime, or who, *at or before the time of the killing*, with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental." Alternatively, CALJIC No. 8.27 could be qualified by telling the jury directly, through a separate supplemental instruction, that the rule of liability described in the instruction does not apply to a person who aids and abets the perpetrator of the crime only after the killing has been completed. (See, e.g., *People* v. *Asher*, *supra*, 273 Cal.App.2d at p. 890, fn. 2 [Jury instructed not to convict alleged robbery accomplices of first degree murder unless convinced beyond a reasonable doubt that accomplices "either conspired to rob or aided [and] abetted . . . in the robbery prior to the time the fatal shot was fired."].) There may also be other proper modifications or special instructions that would convey the same rule.

As defendant cannot show any prejudice for the reasons given above, we need not decide whether the failure to modify or supplement CALJIC No. 8.27 in this case was error.

DISPOSITION

The judgment of the Court of Appeal is affirmed.

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.	BAXTER, J.
MOSK, J.	CHIN, J.
KENNARD, J.	BROWN, J.

SF2007402455
20105446.wpd

OPPOSITION BRIEF

No. 07-544

IN THE SUPREME COURT OF THE UNITED STATES

CHRIS CHRONES, Warden,

Petitioner

v.

MICHAEL PULIDO,

Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. BRADLEY O'CONNELL*
Assistant Director
First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, California 94107
(415) 495-3119
COUNSEL FOR RESPONDENT

*Counsel of Record

QUESTIONS PRESENTED

1. Does the rule of *Stromberg v. California*, 283 U.S. 359 (1931), require reversal where a case goes to the jury on a legally unauthorized theory and the reviewing court cannot be certain whether the conviction rests upon the unconstitutional theory or on a valid alternative theory?

2. Where a habeas court cannot determine whether jurors relied on an unconstitutional ground or on a valid alternative theory, does that uncertainty necessarily represent a "grave doubt," indicating that the error had a "substantial and injurious effect or influence" under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O'Neal v. McAninch*, 513 U.S. 432 (1995)?

3. Under *Brecht* and *O'Neal*, is there necessarily "grave doubt" as to the effect of submission of a legally unauthorized theory, where: (a) the reviewing court cannot determine whether the verdict rests upon the unconstitutional theory or on a valid alternative theory; (b) there is evidentiary support for the legally invalid theory; (c) the evidence as to the legally valid theory is in conflict; (d) the invalid theory rests on direct evidence, while the valid theory rests upon inference and conjecture; and (e) the jurors' multiple queries during deliberations, the judge's inadequate responses to those questions, and the jurors' deadlock on a separate allegation of personal firearm use strongly suggest that some jurors relied upon the invalid theory?

Table of Contents

Page

Questions Presented 1

Table of Authorities iv

Brief in Opposition to Petition for Writ of Certiorari 1

Statement of the Case 1

Reasons for Denying the Writ 3

Summary of Argument 3

I. Under The Well-Settled Rule of *Stromberg v. California*, Submission of an Unconstitutional Ground to a Jury Requires Reversal Where the Reviewing Court Cannot Determine Whether the Jurors Relied on the Unauthorized Ground or on a Valid Alternative Ground 6

II. Uncertainty Regarding the Ground for a Verdict Requires Reversal Under *Stromberg*, Regardless of Whether the Error is Deemed a "Structural Defect" or a "Trial Error." Like *Neder*, *Stromberg* Defines a Circumstance Which Requires a Finding of Prejudice, Even Under a Harmless Error Review 10

III. This Case Presents No Cert-worthy Question on AEDPA's Application to a State Court's Harmless Error Conclusion. Under *Fry v. Pliler*, No Such Separate Analysis Is Necessary, And, in Any Event, The State Court's Failure to Consider the Complete Special Circumstance Instructions Was Objectively Unreasonable ... 17

IV. This Case Is Not A Suitable Vehicle For Reconsideration Of The *Stromberg* Rule Or Its Relationship To The *Brecht* Standard, Because The Error Was Plainly Prejudicial Under *Brecht* Under The Totality Of Circumstances 22

1. The other verdicts do not resolve whether some jurors relied on the unauthorized "late joiner" theory 22

2. There was evidentiary support for the invalid legal theory 23

3. The evidence supporting the legally valid theory was contested 24

4. The legally invalid theory was supported by direct evidence, while the valid alternative ground rested on inference and speculation . . . 24

5. The jurors' many questions during deliberations and the court's inadequate responses strongly suggest that some jurors relied on the "late joiner" theory. 25

CONCLUSION 28

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. Fulminante,
499 U.S. 279 (1991) 9

Bachellar v. Maryland,
397 U.S. 564 (1970) 7

Becht v. United States,
408 F.3d 541 (8th Cir. 2005) 16

Bollenbach v. United States,
326 U.S. 607 (1946) 6, 20, 27

Boyde v. California,
494 U.S. 370 (1990) 7, 20

Brecht v. Abrahamson,
507 U.S. 619 (1993) ..... i, 3, 14, 22, 27

Chapman v. California,
386 U.S. 18 (1967) 4, 9, 13

Chiarella v. United States,
445 U.S. 222 (1980) 7, 8

Clark v. Crosby,
335 F.3d 1303 (11th Cir. 2003) 15, 16

Clay v. United States,
403 U.S. 698 (1971) 7

Cramer v. United States,
325 U.S. 1 (1945) 7

Fiore v. White,
531 U.S. 225 (2001) 6

Fry v. Pliler,
___ U.S. ___, 127 S. Ct. 2321 (2007) 17

Griffin v. United States,
502 U.S. 46 (1991) 4, 7, 9-11, 15, 16

In re Winship,
397 U.S. 358 (1970) 6

Jenkins v. Georgia,
418 U.S. 153 (1974) 7

Kansas v. Marsh,
__ U.S __, 126 S. Ct. 2516 (2006) 20

Lara v. Ryan,
455 F.3d 1080 (9th Cir. 2006) 12, 19

Leary v. United States,
395 U.S. 6 (1969) 7, 8

Middleton v. McNeil,
541 U.S. 433 (2004) 20

Miller-El v. Dretke,
545 U.S. 231 (2005) 21

Mills v. Maryland,
486 U.S. 367 (1988) 4, 7, 9, 15

Neder v. United States,
527 U.S. 1 (1999) 3, 4, 10-13, 16, 24

O'Neal v. McAninch,
513 U.S. 432 (1995) ..... i, 4, 14, 22, 27

Parker v. Secretary, Department of Corrections,
331 F.3d 764 (11th Cir. 2003) 15, 16

Penry v. Johnson,
532 U.S. 782 (2001) 20

Pierce v. United States,
314 U.S. 306 (1941) 7

Pulido v. Chrones,
487 F.3d 669 (9th Cir. 2007) 3

Quigley v. Vose,
834 F.2d 14 (1st Cir. 1987) 15

Rompilla v. Beard,
545 U.S. 374 (2005) 21

Rose v. Clark,
478 U.S. 570 (1986) 8, 15

Shafer v. South Carolina,
532 U.S. 36 (2001) 27

Simmons v. South Carolina,
512 U.S. 154 (1994) 27

Stirone v. United States,
361 U.S. 212 (1960) 7, 8

Street v. New York,
394 U.S. 576 (1969) 7

Stromberg v. California,
283 U.S. 359 (1931) ..... *passim*

Sullivan v. Louisiana,
508 U.S. 275 (1993) 4, 11, 12

Tenet v. Doe,
544 U.S. 1 (2005) 10

Termuhlo v. City of Chicago,
337 U.S. 1 (1949) 7

Thomas v. Collins,
323 U.S. 516 (1945) 7

United States v. Bailey,
405 F.3d 102 (1st Cir. 2005) 15

United States v. Ellyson,
326 F.3d 522 (4th Cir. 2003) 14, 15

United States v. Gaudin,
515 U.S. 506 (1995) 6

United States v. Holly,
488 F.3d 1298 (10th Cir. 2007) 15, 16

United States v. Peterson,
236 F.3d 848 (7th Cir. 2001) 14

United States v. Shellef,
507 F.3d 82 (2nd Cir. 2007) 14

Wiggins v. Smith,
539 U.S. 510 (2003) 21

Williams v. North Carolina,
317 U.S. 287 (1942) 7, 8

Williams v. Taylor,
529 U.S. 362 (2000) 21

Yates v. United States,
354 U.S. 298 (1957) 9

Zant v. Stephens,
462 U.S. 862 (1983) 7, 12

STATE CASES

People v. Pulido,
15 Cal. 4th 713, 936 P.2d 1235 (1997) 2

PRIOR BRIEFING

Pulido v. Lamarque,
9th Cir. No. 05-15916 [State's] Appellant's Opening Br., p. *52 [2005 WL 3128204] 6, 16

FEDERAL STATUTES

United States Code

28 U.S.C. § 2254(d) 2, 10, 17, 18

United States Constitution

Amendment I 8

Amendment XIV 6, 8, 16

No. 07-544

IN THE SUPREME COURT OF THE UNITED STATES

CHRIS CHRONES, Warden,

Petitioner

v.

MICHAEL PULIDO,

Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Like petitioner, Cert. Pet. 3-6, respondent Michael Pulido accepts the California Supreme Court's summary of the trial evidence. App. 102a-105a.[1]

Michael Pulido was 16 at the time of the charged homicide. App. 32a. The murder charge went to the jury on three alternative theories: (a) that Pulido personally shot the victim; (b) that Pulido aided and abetted in the robbery prior to or during the principal perpetrator's shooting of the victim; or (c) that Pulido aided in the robbery only *after* the shooting (the "late joiner" theory).

---

[1] Record citations are to the Appendix to the Petition for Writ of Certiorari ("App.") and to the parties' respective Excerpts of Record ("State ER" and "Pulido ER"), filed in the Ninth Circuit.

Over its five days of deliberations, the jury submitted numerous queries concerning an aider/abettor's liability under a felony-murder theory. The jury ultimately convicted Pulido of first-degree murder, robbery, and a robbery felony-murder "special circumstance." However, the jurors deadlocked, either 8-4 or 4-8, on an enhancement allegation of personal use of a firearm, indicating that some jurors based their murder verdict upon an aiding/abetting theory. App. 33a, 5a; State ER 376-377. The court sentenced Pulido to life without possibility of parole.

On direct appeal, the California Supreme Court repudiated the "late joiner" theory; it concluded that assistance in a robbery would not support felony-murder liability if that assistance occurred only after the homicide. *People v. Pulido*, 15 Cal.4th 713, 936 P.2d 1235 (1997); App. 101a-120a. However, the state court declared the submission of that unauthorized theory harmless based on the assumption that the special circumstance verdict indicated that the murder occurred "while" Pulido was a participant in the robbery. App. 116a-117a.

Pulido filed a pro se petition for a writ of habeas corpus, 28 U.S.C. § 2254. The district court granted the writ in an extensive opinion. App. 32a-97a. Upon reviewing the complete jury charge, the district court recognized that, in the form submitted to Pulido's jurors, the special circumstance instructions did *not* require a finding of participation in the robbery contemporaneous with the killing. The district court found: (1) that the state court decision was "contrary to" and an "unreasonable application" of clearly established federal law, *id.*, § 2254(d)(1); App. 52a-65a; and

(2) that the instructional error had a "substantial and injurious effect or influence" under *Brecht v. Abrahamson*, 503 U.S. 619 (1993). App. 65a-67a.

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment granting the writ. *Pulido v. Chrones*, 487 F.3d 669 (9th Cir. 2007); App. 1a-24a. Under *Stromberg v. California*, 283 U.S. 359 (1931), and its progeny, the murder conviction could not stand because the Circuit could not be certain whether the jurors had relied upon a legally unauthorized ground (the "late joiner" theory) or upon a valid alternative theory (assistance in the robbery contemporaneous with the killing). App. 8a-12a.[2] The state petitioned for rehearing en banc, but "no judge of the [Circuit] requested a vote on it." App. 31a.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

This is not a cert-worthy case because the *Stromberg* rule is consistent with recent harmless error jurisprudence, including *Neder v. United States*, 527 U.S. 1 (1999), and because the disposition would be the same under any standard, as reflected in the district court's finding of prejudice under *Brecht v. Abrahamson*, 503 U.S. 619 (1993). This is a case of conceded constitutional error – the submission of a theory of murder liability not authorized under state law. While the state attempts to portray a collision between divergent prejudice standards, the disposition of this

[2] In a separate concurrence, Judge O'Scanlon urged re-examination of the *Stromberg* rule. App. 12a-15a. In another concurrence, Judge Thomas defended the *Stromberg* rule, App. 24a, but also explained that the result would the same under a more wide-ranging harmless error analysis, App. 15a-23a.

case actually turns upon more pedestrian matters, which are neither cert worthy nor reasonably susceptible to dispute.

The state is attempting to use this case as a vehicle for reconsideration of the *Stromberg* rule -- the longstanding doctrine requiring reversal when a reviewing court cannot determine whether a verdict rested upon an unconstitutional ground. The reiteration of that rule in such cases as *Mills v. Maryland*, 486 U.S. 367 (1988), and *Griffin v. United States*, 502 U.S. 46 (1991), attests to its continuing viability. The rationale of the *Stromberg* line is entirely consistent with contemporary jurisprudence: Where the instructions allowed the jurors to base a conviction on a legally invalid but factually supported scenario, any further "harmless error" review is necessarily fruitless, for there is no "object" to which to apply that analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

The *Stromberg* rule remains clearly established law, regardless of whether it is conceived as a form of "structural defect" or simply as defining a circumstance which requires a finding of prejudice under any harmless error standard. *Stromberg* is comparable to *Neder v. United States*, 527 U.S. 1, 19 (1999). Although omission of an element is susceptible to harmless error review, that error cannot be harmless if the omitted element was factually disputed. So too, when a reviewing court is uncertain whether or not the jurors relied upon a factually supported, but legally unauthorized, ground of conviction, there is necessarily both a "reasonable doubt," *Chapman v. California*, 386 U.S. 18 (1967), and a "grave doubt" as to the error's effect on the verdict. *O'Neal v. McAninch*, 513 U.S. 432 (1995).

The result here would be the same, even under a more fluid prejudice analysis, as the district court's decision demonstrates. App. 38a-67a. The state tried Pulido primarily on the theory that he alone robbed the store and personally shot the clerk. Pulido maintained that his uncle Michael Aragon committed the robbery and murder and that he assisted his uncle only after the shooting, during his flight from the scene. We know that some of the jurors rejected the prosecution's personal commission theory and instead relied on some form of aiding/abetting, because they deadlocked on an enhancement allegation of personal firearm use. The state's arguments rest on the notion that those jurors who rejected the personal use allegation convicted Pulido of murder on the basis of a factual theory not advanced in either side's evidence – i.e., that Pulido's uncle committed the murder, but that Pulido participated in the robbery in some unspecified way from the beginning. Although the defective instructions allowed them to find Pulido liable for felony-murder even if they believed his account, the state insists that the jurors instead developed an entirely new narrative of the events.

The state also ignores the affirmative indicia that these jurors focused on the invalid "late joiner" theory. Again and again throughout their deliberations, the jurors posed questions concerning the scope of aiding/abetting liability under the felony-murder instructions. But the judge did nothing to dispel the instructions' erroneous message that any participation in the robbery would subject Pulido to felony-murder liability, even if that assistance occurred only after the shooting. In view of the recognized materiality of mid-deliberation queries as windows into the

jurors' thinking, e.g., *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946), a finding of prejudice is inescapable under *Brecht* or any other standard.

Because Pulido's entitlement to relief under a traditional *Brecht* analysis is so clear, this case represents an exceptionally poor vehicle for examination of any broader questions concerning the *Stromberg* rule.

I. Under The Well-Settled Rule of *Stromberg v. California*, Submission of an Unconstitutional Ground to a Jury Requires Reversal Where the Reviewing Court Cannot Determine Whether the Jurors Relied on the Unauthorized Ground or on a Valid Alternative Ground.

There is no dispute that allowing a jury to convict a defendant based on conduct which does not come within the state's definition of the offense violates elementary principles of due process. *Fiore v. White*, 531 U.S. 225 (2001); *In re Winship*, 397 U.S. 358 (1970); see also *United States v. Gaudin*, 515 U.S. 506 (1995) (duty to instruct accurately on elements of offense). The state has "tacitly conceded: that instructional error occurred because there was a reasonable likelihood that the jury misapplied the law [citation] of felony murder by failing to find beyond a reasonable doubt that [Pulido] aided and abetted the robbery before the murder."[3]

1. The state faults the Circuit Court for relying upon a longstanding doctrine, which this Court has never questioned, much less overruled: Where a case goes to a jury on an unconstitutional ground, a general verdict of conviction cannot stand if the reviewing court is uncertain whether the conviction rested upon the invalid theory

---

[3] *Pulido v. Lamarque*, 9th Cir. No. 05-15916, [State's] Appellant's Opening Br., p. *52 [2005 WL 3128204].

or on a legally valid alternative ground. The Court first articulated the rule in *Stromberg v. California*, 283 U.S. 359, 368 (1931), and has applied it at least a dozen times over the intervening decades. *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Pierce v. United States*, 314 U.S. 306, 310 (1941); *Cramer v. United States*, 325 U.S. 1, 36 fn. 45 (1945); *Thomas v. Collins*, 323 U.S. 516, 528-529 (1945); *Terminello v. City of Chicago*, 337 U.S. 1, 5 (1949); *Stirone v. United States*, 361 U.S. 212, 217-219 (1960); *Street v. New York*, 394 U.S. 576, 585-588 (1969); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 570-571 (1970); *Clay v. United States*, 403 U.S. 698, 704-705 (1971); *Jenkins v. Georgia*, 418 U.S. 153, 157-158 (1974); *Mills v. Maryland*, 486 U.S. 367, 376-377 (1988); accord *Boyde v. California*, 494 U.S. 370, 379-380 (1990); *Chiarella v. United States*, 445 U.S. 222, 237 fn. 21 (1980) (each recognizing the rule). The judgment may stand, however, where the record affirmatively shows that the jury made the necessary findings for the valid alternative theory, such as where the jurors returned a separate verdict corresponding to the valid ground. *Zant v. Stephens*, 462 U.S. 862, 881 (1983).

The state attempts to confine the *Stromberg* rule to "convictions for conduct that the State lacks the authority to punish as crime." Cert. Pet. 13. However, this Court has consistently formulated the rule in terms of "general-verdict convictions that may have rested on an unconstitutional ground. [Citations.]" *Griffin v. United States*, 502 U.S. 46, 55 (1991). It has not distinguished between theories directed to conduct which the state can never punish (such as constitutionally protected speech)

and those directed to acts which the legislature simply has not criminalized under the relevant statute.[4]

While *Stromberg* and some other cases have involved First Amendment or similar claims, the Court has also applied the same analysis to due process and other constitutional violations which have nothing to do with any protected conduct. E.g. *Williams v. North Carolina*, 317 U.S. at 291-304 (alternative theory for bigamy conviction violated full-faith-and-credit clause); *Leary v. United States*, 395 U.S. at 29-32 (alternative theory for marijuana transportation relied on unconstitutional presumption of knowledge of illegal importation); *Stirone v. United States*, 361 U.S. at 216-219 (submission of alternative ground not considered by the grand jury or charged in indictment).[5] Although each of these cases redressed submission of a constitutionally defective theory, none involved constitutionally protected conduct.[6]

The state argues that this Court has implicitly overruled *Stromberg* and its many progeny in a line of cases commencing with *Rose v. Clark*, 478 U.S. 570

---

[4] E.g., *Chiarella v. United States*, 445 U.S. at 237 fn. 2: "We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct."

[5] *Stirone* too involved the absence of the requisite authorization for one of the prosecution's theories. In *Stirone*, the government relied on a factual scenario which had not been authorized by the grand jury. In *Pulido*, it relied on a scenario which had not been authorized by the legislature.

[6] E.g., *Leary* at 54: "[N]othing in what we hold today implies any constitutional disability in Congress to deal with the marijuana traffic by other means."

(1986).[7] But subsequent events belie that suggestion. Two years after *Rose*, the Court applied the *Stromberg* rule in finding an improper penalty phase instruction reversible: "With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching its verdict. [Citations.]" *Mills v. Maryland*, 486 U.S. 367, 376 (1988).

In yet another post-*Rose* opinion, the Court reiterated: "A host of our decisions ... has applied ... 'the rule of the *Stromberg* case' to general-verdict convictions that may have rested on an unconstitutional ground. [Citations.]" *Griffin v. United States*, 502 U.S. 46, 55 (1991).[8] The Court expressed no misgivings on that rule's continued application to constitutionally defective legal theories, but declined to extend it to the quite-different situation of a *factually unsupported* alternative ground.[9] The Court described the distinction between factually unsupported and legally erroneous theories as a "clear line" which "happens to be a line that makes

---

[7] *Rose* applied the *Chapman* harmless error standard, *Chapman v. California*, 386 U.S. 18 (1967), to an unconstitutional rebuttable presumption of malice.

[8] *Griffin* also post-dates *Arizona v. Fulminante*, 499 U.S. 279 (1991), where the Court first adopted the current nomenclature distinguishing "trial errors" from "structural defects."

[9] The Court did express reservations about *Yates v. United States*, 354 U.S. 298 (1957), which had extended the *Stromberg* approach to a legal error which (unlike the one here) did not involve any constitutional violation (an alternative predicate act which was time-barred). *Griffin*, 502 U.S. at 51-56. Ultimately, however, the Court had no occasion to reconsider the validity of *Yates*, but simply found it inapplicable to factually-unsupported theories. *Griffin* at 56.

good sense." *Griffin* at 59. While "jurors *are* well equipped to analyze the evidence [citation]" and weed out factually unsupported theories, they are not similarly "equipped" to avoid legally insufficient grounds, such as a theory that "fails to come within the statutory definition of the crime." Hence, "there is no reason to think that their own intelligence and experience will save them from that error." *Ibid.*, emphasis in original.

Because *Griffin* ratified the longstanding application of the *Stromberg* rule to constitutionally defective legal theories, such as the unauthorized "late joiner" theory, those cases represents binding and "clearly established" precedents, 28 U.S.C. § 2254(d)(1), under elementary principles of stare decisis. "[I]f the 'precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' [Citation.]" *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005).[10]

II. Uncertainty Regarding the Ground for a Verdict Requires Reversal Under *Stromberg*, Regardless of Whether the Error is Deemed a "Structural Defect" or a "Trial Error." Like *Neder*, *Stromberg* Defines a Circumstance Which Requires a Finding of Prejudice, Even Under a Harmless Error Review.

1. The state portrays this case as presenting a stark choice between classification of the unauthorized theory as a "structural defect" or as a "trial error." However important that distinction may be in some cases, here it is nothing more

---

[10] As discussed in Part II, there is no such tension here in the first place, because *Stromberg* and its progeny are consistent with the reasoning of recent harmless error cases, such as *Neder v. United States*, 527 U.S. 1 (1999).

than an academic question of nomenclature. Under either characterization, the rule requiring reversal when a court cannot determine whether the conviction rested on an unconstitutional legal theory continues to make "good sense." *Griffin*, 502 U.S. at 59, and is consistent with the reasoning of the Court's recent harmless error jurisprudence.

Any harmless error inquiry must respect "the jury trial guarantee," lest the appellate court "'become in effect a second jury to determine whether the defendant is guilty.' [Citation.]" *Neder v. United States*, 527 U.S. 1, 19 (1999). "Harmless-error review looks, we have said, to the basis on which 'the jury *actually rested* its verdict.' [Citation.]" *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in *Sullivan*). Omission of a discrete element lends itself to such a review; submission of a separate unauthorized ground for conviction does not, unless the record discloses the actual basis for the verdict.

In the typical *Neder* situation, the state relies on an alleged set of facts which could legitimately support a conviction. But, due to the instruction's omission of an element, the jury makes some, but not all, of the requisite findings concerning the charged episode. If the evidence as to the omitted element was *uncontested*, such that no rational juror could fail to find that element, affirmance of the verdict entails no derogation of the constitutional right at stake. *Neder*, 527 U.S. at 15-19.

Conversely, however, in a *Stromberg* situation, the jury is presented with multiple episodes or alternative factual scenarios, one of which could not legitimately support a conviction. If the record establishes that the jurors "actually rested" their

verdict on a valid ground, then the reviewing court can and should find the error harmless. But if the court cannot tell which scenario was the basis for the verdict, there is no room for further harmless error review, because the court lacks the essential means necessary for that analysis. As with a defective instruction defining the reasonable doubt standard, that uncertainty leaves the reviewing court with "no *object*, so to speak, upon which harmless-error scrutiny can operate." *Sullivan v. Louisiana*, 508 U.S. at 280, emphasis in original.

That said, recognition of the unsuitability of a harmless error finding in these circumstances does not necessarily compel characterization of submission of an unauthorized legal theory as a form of "structural defect." The *Stromberg* rule may just as easily be understood as a categorical application of prejudice analysis. Submission of an unauthorized theory is harmless where the record establishes that the jurors relied on the valid ground[11] and prejudicial where the court cannot determine which ground was the basis for the verdict, as in this case.

The *Stromberg* rule, properly understood, is similar to *Neder*. *Neder* represents more than the "soundbite" that omission of an element is subject to harmless error review. It directs *how* a court must conduct that review:

> [S]afeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error-for example, *where the defendant contested the omitted element and*

---

[11] E.g., *Zant v. Stephens*, 462 U.S. 862, 881 (1983); *Lara v. Ryan*, 455 F.3d 1080, 1086-1087 (9th Cir. 2006).

> *raised evidence sufficient to support a contrary finding-it should not find the error harmless.* *Neder*, 527 U.S. at 19, emphasis added.

Thus, *Neder* prescribes a rigorous standard, which forbids any judicial reweighing of conflicting evidence or inferences. That limitation is necessary to avoid "'a denigration of the constitutional rights involved' [citation]." *Neder* at 19.

The state's reliance on *Neder* is surprising, because Pulido's entitlement to relief under that analysis is readily apparent. As the district court explained, the question whether Pulido joined in the robbery before or after the shooting was very much in dispute. There was no direct evidence indicating such a role, and Pulido himself flatly denied any foreknowledge of his uncle's plan to rob the establishment. Under *Neder*, the contested character of that crucial prerequisite to felony-murder liability squarely precludes any finding of harmless error, and the judgment granting habeas relief should be upheld on that ground alone. App. 63a.

Neder also demonstrates the continued viability of the analogous *Stromberg* rule. Just as the contested character of the evidence on an omitted element categorically requires a finding of prejudice, *Neder*, 527 U.S. at 19, the same is true of a reviewing court's uncertainty whether the jurors based their verdict on an unconstitutional ground.

Where an appellate court cannot ascertain the actual basis for a general verdict, it necessarily harbors a reasonable doubt whether the invalid theory "contributed to the verdict" under *Chapman v. California*, 386 U.S. 18, 24 (1967). Similarly, where the issue arises on habeas, that uncertainty denotes a "grave doubt"

whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal v. McAnnich*, 513 U.S. 432, 435 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993). Uncertainty is the essence of the "grave doubt" which satisfies the *Brecht-O'Neal* standard. "[T]he uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict...." *O'Neal* at 435.[12]

Because uncertainty whether a verdict rested on an unconstitutional ground compels a finding of prejudice under either a *Chapman* or *Brecht* standard, the doctrinal question which the state attempts to pose amounts to nothing but a debate over nomenclature. Regardless of whether submission of an unconstitutional theory is deemed a "structural defect" or *Stromberg* simply represents an application of prejudice analysis to a particular species of "trial error," the *substance* of the *Stromberg* rule remains as compelling today as it was 75 years ago.

2. Because there is no conflict between *Stromberg* and harmless error analysis, the putative circuit split suggested by the state largely disappears. The *Stromberg* rule is alive and well in other circuits. E.g., *United States v. Shellef*, 507 F.3d 82, 107-109 (2nd Cir. 2007); *United States v. Ellyson*, 326 F.3d 522, 530-531 (4th Cir. 2003); *United States v. Peterson*, 236 F.3d 848, 857 (7th Cir. 2001) (each

---

[12] Recognition of the equivalence of the *Stromberg* inquiry with *Brecht* prejudice is also consistent with *O'Neal's* observation that "our rule avoids the need for judges to read lengthy records to determine prejudice in every habeas case." *O'Neal* at 443. When a case goes to the jury on a legally unauthorized ground, a habeas court can properly confine its prejudice review to whether the verdicts affirmatively establish that the jurors relied on a valid alternative ground, and it is neither necessary nor appropriate for it to engage in any reweighing of the evidence.

reversing under *Stromberg*, where court could not determine whether jury relied on invalid legal theory).[13] However, some of those courts explicitly treat *Stromberg* as an application of harmless error analysis. E.g., *Ellyson*, at 530-531.

United States v. Holly, 488 F.3d 1298 (10th Cir. 2007), and *Parker v. Secretary, Dept. of Corrections*, 331 F.3d 764 (11th Cir. 2003), involved delivery of *partially deficient* instructions on an otherwise valid ground. Each circuit recognized that the *Stromberg* rule would govern in a case, such as Pulido's, where one alternative ground for conviction was "legally erroneous in [its] entirety. [Citations.]" *Holly* at 1305-1306 & fn. 3; see also *Parker* at 777-778 & fn. 10. The courts limited their harmless error review "to the erroneously instructed ground considered separately," because *Stromberg* precluded reliance on the valid alternative ground. *Holly* at 1306. "An error with regard to one independent basis for the jury's verdict cannot be rendered harmless solely because of the availability of the other basis," for that would "eviscerate[]" the *Stromberg* rule. *Parker* at 778; accord *Holly* at 1306-1307 & fn. 6.[14]

---

[13] The state points to a 1987 First Circuit opinion which had viewed *Rose v. Clark* as implicitly overruling the *Stromberg* cases. *Quigley v. Vose*, 834 F.2d 14 (1st Cir. 1987). But, as discussed in Part I, this Court's subsequent decisions in *Mills v. Maryland* (1988) and *Griffin v. United States* (1991) have proven that assessment wrong. The First Circuit's more recent case law appears to recognize the continued vitality of the *Stromberg* rule. E.g., *United States v. Bailey*, 405 F.3d 102, 109-110 (1st Cir. 2005).

[14] To the extent that there is conflict in the case law, it appears to be within the Eleventh Circuit. *Parker* recognized that reliance on a valid alternative ground to cure submission of a defective theory would contravene "clearly established federal law," *Parker*, 331 F.3d at 779, but a roughly contemporaneous opinion of a separate panel questioned the application of that rule to a legally inadequate theory.

Becht v. United States, 408 F.3d 541, 549-550 (8th Cir. 2005) too is readily distinguishable. An instruction allowing a child pornography conviction if the photos "appeared" to depict real children was plainly harmless, because there was no evidentiary support for the invalid theory, while the evidence that the images were of "actual minors" was not susceptible to dispute. Pulido has no quarrel with the proposition that submission of an invalid theory is harmless if there is no factual support for it. That result is consistent with *Griffin*'s confidence in jurors' ability to weed out factually unsupported theories, *Griffin*, 502 U.S. at 509, and *Neder*'s harmless error finding concerning omission of an uncontested element, *Neder*, 527 U.S. at 19.

Even if there are potential questions on the outer perimeters of *Stromberg* (e.g., its application to partially deficient theories), this case poses no such issues. The "late joiner" theory was invalid in its entirety, rather than just misdescribed (cf. *Holly*, 488 F.3d at 1305-1306 & fn. 3); there was evidentiary support for the invalid theory (contrast *Becht*, 408 F.3d at 549-550); and the evidence supporting the valid theory (contemporaneous assistance) was in conflict (*Holly* at 1310-1311). The ultimate disposition of Pulido's claim would be the same in any circuit.

Clark v. Crosby, 335 F.3d 1303 (11th Cir. 2003). In any event, *Clark* too is distinguishable because the panel proceeded on the premise that the unauthorized theory there did not involve any constitutional violation, *id.* at 1310, while here the state has conceded that the misinstruction infringed Pulido's due process right to jury determination of every element of the offense. *Pulido v. Lamarque*, 9th Cir. No. 05-15916, [State's] Appellant's Opening Br., p. *52 [2005 WL 3128204]

III. This Case Presents No Cert-worthy Question on AEDPA's Application to a State Court's Harmless Error Conclusion. Under *Fry v. Pliler*, No Such Separate Analysis Is Necessary, And, in Any Event, The State Court's Failure to Consider the Complete Special Circumstance Instructions Was Objectively Unreasonable.

The state attempts to recast the *Stromberg* rule as presenting issues under the AEDPA standard, 28 U.S.C. § 2254(d)(1). For three distinct reasons, this case poses no review-worthy issues under § 2254(d)(1).

1. This Court's recent decision in *Fry v. Pliler*, __ U.S. __, 127 S.Ct. 2321 (2007), has rendered § 2254(d)(1) largely irrelevant to a habeas court's assessment of whether constitutional error was prejudicial. In its pre-*Fry* decision, the district court here conducted an exhaustive two-stage prejudice analysis: It first applied § 2254(d)(1) and found that the state court's harmless error conclusion represented an objectively unreasonable application of the *Chapman* standard, which should have applied on Pulido's direct appeal. App. 52a-65a. The district court then conducted a separate independent review and determined that the error had a "substantial and injurious effect" under the *Brecht* standard. App. 65a-67a.

Fry, however, makes clear that this unwieldy two-stage prejudice review was not necessary. When a habeas court finds constitutional error, it can proceed directly to its own determination of prejudice under *Brecht*: "[I]t certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Fry*, 127 S.Ct. at 2327, emphasis in original. Regardless of whether that prejudice analysis should be limited to the *Stromberg*

inquiry or should involve a more far-ranging examination of the entire record (as in the district court decision), the § 2254(d)(1) standard does not enter into the picture.

2. Nor does this case pose any doctrinal conflict between the California Supreme Court's and the Ninth Circuit's respective formulations of the framework for review of submission of an invalid alternative ground. The state court did not review the error under *Chapman*, but under a line of state authorities which looked to whether a jury's other findings cured a misinstruction. App. 116a-117a. The *standards* which the state and federal courts employed were substantively similar in their focus on whether the special circumstance established that the jurors relied upon the valid alternative theory. The true reason for the disparate dispositions of Pulido's state appeal and federal petition has little to do with the formulation of the standard. Instead, this case turns on the more mundane case-specific process of comparing the defective felony-murder instructions with those on the special circumstance.

3. "The cornerstone of the California Supreme Court's determination that the failure to instruct on the timing element could not have been prejudicial to [Pulido] was the jury's special circumstance verdict." App. 55a (dist. ct. opn.). The state court mistakenly assumed that the special circumstance verdict required a finding that Pulido's participation in the robbery was contemporaneous with the shooting. App. 116a-117a. If the judge had delivered the standard instructions on the special circumstance, that assumption would have been defensible. The problem was that both the oral and written instructions allowed the jurors to return a special circumstance verdict without making any such contemporaneity finding. The

California Supreme Court had looked only to the first sentence of the "Introductory" special circumstance instruction, which described that charge as "murder ... committed while the defendant was engaged in or was an accomplice in the commission or the immediate flight after committing or attempting to commit robbery." App. 116a-117a.; State ER 221. But the subsequent substantive instruction, which listed the specific criteria for the special circumstance, allowed a verdict either if the killing occurred while Pulido was a participant in the robbery "or" if the murder was committed to "advance" the robbery. App. 8a fn. 4; State ER 223. "[U]nder the second theory, the jury could have found that the special circumstance applied to Petitioner because the murder was committed in order to carry out a robbery which Petitioner aided and abetted only after the killing occurred." App. 56a-57a (dist. ct. opn.); see also App. 10a-11a (9th Cir. opn.).

Every judge who was aware of this defect – i.e., the substitution of the disjunctive "or" for the conjunctive "and" – has agreed that the special circumstance did not require a finding that Pulido's participation was contemporaneous with the killing.[15] The problem with the state court's disposition has less to do with its construction of any particular passage than with its reliance on an introductory snippet without reviewing the complete instructions on the special circumstance.

---

[15] Since he concurred in the judgment, App. 12a, even Judge O'Scanlon (who urged reconsideration of the *Stromberg* rule) evidently agreed that the special circumstance did *not* reflect a finding of contemporaneous participation. Had he agreed with the state's reading, he presumably would have voted to deny relief under *Lara v. Ryan*, 455 F.3d 1080, 1086-1087 (9th Cir. 2006).

Even if (notwithstanding *Fry v. Pliler*), a separate § 2254(d)(1) review of the harmless error finding was necessary, application of that standard is extraordinarily easy in this case (and certainly poses no cert-worthy issue). The "'well-established proposition'" at stake here is "'that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' [Citation.]" *Boyde v. California*, 494 U.S. 370, 378 (1990).[16] If a state court is to embrace some other verdict as proof the jurors made a finding curing the misinstruction on the principal charge, it is incumbent upon that court to review the complete instructions on the supposedly-curative separate charge, rather than just an isolated snippet.[17] The error is especially glaring because the "while" language was in a general "Introductory" instruction, while it was the subsequent substantive instruction detailing the specific criteria for special circumstance which allowed a verdict as long as the murder "advanced" the robbery. In jury instructions, as in contracts and statutes, the specific prevails over the general. *Bollenbach v. United States*, 326 U.S. 607, 611-612 (1946).

---

[16] Accord, e.g., *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *Kansas v. Marsh*, __ U.S. __, 126 S.Ct. 2516, 2527 fn. 6 (2006).

[17] *Penry v. Johnson*, 532 U.S. 782, 803-084 (2001), found a state reviewing court's reliance on the alleged curative effect of a supplemental instruction "objectively unreasonable" under similar circumstances. The supplemental instruction was itself subject to "two possible" interpretations, and even the assertedly curative construction "made the jury charge as a whole internally contradictory." *Id.* at 797-799. Similarly here, "[o]nce the entire record is considered ..., it becomes apparent that the supposedly curative instruction actually aggravated, rather than curing, the instructional error." App. 17a-18a (Judge Thomas' concurring opn. in 9th Cir.).

A state court's disposition is objectively unreasonable under AEDPA *where that court fails to consider the complete record relevant to a claim*. Such failures have represented the most common cause of this Court's findings of unreasonable state court decisions. E.g., *Williams v. Taylor*, 529 U.S. 362, 397 (2000) ("the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence"); *Wiggins v. Smith*, 539 U.S. 510, 527-529 (2003) (failure to consider whether information in social service records "would lead a reasonable attorney to investigate further" and reliance on erroneous assumption as to contents of those records); *Rompilla v. Beard*, 545 U.S. 374, 388-390 (2005) (findings of adequate investigation unreasonable where state courts did not address counsel's failure to review file of prior conviction); *Miller-El v. Dretke*, 545 U.S. 231, 240-266 (2005) (rejection of *Batson* claim unreasonable where state court ignored disparate treatment of white and black jurors and history of discriminatory practices). Here too, the state court "based its conclusion, in part, on a clear factual error," *Wiggins* at 529 – i.e., that the special circumstance verdict required a finding of contemporaneous participation in the robbery.

The state court's reliance on the special circumstance as proof of harmlessness, without considering the complete special circumstance instructions, falls squarely within the "unreasonable application" category, as the district court and the Ninth Circuit properly found. App. 54a-59a, 8a-11a.

IV. THIS CASE IS NOT A SUITABLE VEHICLE FOR RECONSIDERATION OF THE *STROMBERG* RULE OR ITS RELATIONSHIP TO THE *BRECHT* STANDARD, BECAUSE THE ERROR WAS PLAINLY PREJUDICIAL UNDER *BRECHT* UNDER THE TOTALITY OF CIRCUMSTANCES.

As discussed in Part II, when a *Stromberg* inquiry leaves a habeas court uncertain whether the jurors relied on an unconstitutional theory, that uncertainty is tantamount to a "grave doubt" as to the error's effect, for purposes of the *Brecht-O'Neal* standard,[18] and no further prejudice analysis is necessary. But the result here will be the same even under a more expansive harmless error review of the totality of circumstances. That is exactly the type of review which the district court conducted in finding the requisite "substantial and injurious effect" under *Brecht*. App. 65a-67a; see also App. 51a-65a.[19] Pulido submits that five factors, considered cumulatively, compel a finding of prejudice under any standard.

1. **The other verdicts do not resolve whether some jurors relied on the unauthorized "late joiner" theory.** The 8-4 or 4-8 deadlock on the personal firearm use allegation demonstrates that some jurors rejected the prosecution's primary theory that Pulido personally robbed the store and shot the clerk. App. 33a. While those jurors necessarily based their murder verdict on an aiding/abetting theory, the verdicts do not indicate whether they relied on the invalid "late joiner" theory of assistance in the robbery after the shooting or on the legitimate alternative ground of

---

[18] *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *O'Neal v. McAninch*, 513 U.S. 432 (1995).

[19] In his Ninth Circuit concurrence, Judge Thomas similarly "emphasize[d] that the result the majority reaches would be the right result even under a harmless error standard." App. 17a-23a.

assistance prior to or during the shooting. As discussed in Part III, the special circumstance verdict does not resolve the matter, because the substantive instructions on that charge did not require any finding of contemporaneous assistance.

The state also relies on the special circumstance on an alternative rationale. The state maintains that, since the special circumstance required "reckless indifference" to life and assistance as a "major participant" in the robbery, the jurors rejected Pulido's testimony that he only assisted his uncle after the shooting. Cert. Pet. 22-23. No court, state or federal, has adopted that reading of the special circumstance verdict. The California Supreme Court pointedly did not rely on the "reckless indifference"/ "major participant" rationale, but only on its mistaken assumption that the instructions required that the killing occur "while" Pulido was a participant in the robbery. App. 116a-117a. As the district court observed: "Based on the plain language of the instruction and a common sense analysis of the evidence, the jury could have found that Petitioner acted with reckless indifference to the victim's life if Petitioner knew the victim had been shot but failed to come to his aid." App. 58a (summarizing multiple California cases finding reckless indifference "based on an aider and abettor's failure to act without knowing whether the victim is dead or still alive"); see also Judge Thomas concur. opn., App. 19a-20a.[20]

2. **There was evidentiary support for the invalid legal theory.** Pulido admitted prying the stolen register open, while his uncle drove away from the site of

---

[20] Moreover, one theme of the prosecutor's cross-examination of Pulido was that he had shown such indifference by failing to check on the stricken victim's condition or call "911." Pulido ER 147, 158-161B.

the murder, and then disposing of the register in a field. That admitted assistance to Aragon during his flight from the crime, prior to reaching a "place of temporary safety," rendered Pulido guilty of robbery as an aider/abettor. The instructions' erroneous "late joiner" theory, in turn, subjected him to felony murder liability, even though he joined in the robbery only after the homicide. Thus, although the "late joiner" theory was legally insufficient, it was, nonetheless, factually supported. Especially since it was based on the defendant's own testimony, the jurors could easily have relied on that invalid theory to convict him of murder.

3. **The evidence supporting the legally valid theory was contested.** As discussed in Part II, omission of an element is harmless where that element rested on uncontroverted evidence, but not "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." *Neder v. United States*, 527 U.S. at 19. Similarly, submission of an invalid ground for conviction may be harmless where the evidence supporting the valid alternative was uncontroverted. But that is certainly not the case here. Pulido vehemently denied any knowledge of or participation in the robbery prior to or during the shooting.

4. **The legally invalid theory was supported by direct evidence, while the valid alternative ground rested on inference and speculation.** It is much more plausible that the jurors relied on the invalid "late joiner" theory than that they relied on the valid alternative of contemporaneous assistance, for the latter theory did not correspond to any witness' account or to either side's view of the evidence.

There was circumstantial evidence from which the prosecution constructed a narrative in which Pulido alone committed the robbery and murder. The split vote on the personal firearm use allegation reflects that some, but not all, the jurors found that scenario convincing. But, as summarized by the district court, there was substantial "contrary evidence." App. 63a. Pulido's own testimony provided an alternative narrative in which Aragon murdered the attendant and Pulido assisted his uncle only after the killing.

Reasonable jurors could plausibly have found either of these scenarios. But the state asks this Court to presume that those jurors who rejected the personal use allegation instead devised an entirely new story of their own creation.[21] Because it bears little resemblance to the evidence, the state's theory raises a host of questions as to what exactly the jurors supposedly found Pulido did and when he did it.

The vice of these instructions was that they relieved the jurors of the necessity of deciding *when* Pulido joined the robbery. Because Pulido's admitted assistance to Aragon after the shooting would have appeared sufficient to subject him to felony murder liability under the erroneous instructions, the jurors could stop there.

5. **The jurors' many questions during deliberations and the court's inadequate responses strongly suggest that some jurors relied on the "late joiner" theory.** Over their five days of deliberations, the jurors submitted multiple

---

[21] As noted by the district court, App. 65a, a further problem is that most of the assertedly "powerful" evidence cited by the state, Cert. Pet. 22-23, either supported the theory that Pulido himself shot the attendant (which some jurors rejected by their vote on the firearm use allegation) or indicated simply that he had some involvement in the crime, without resolving *when* that assistance occurred.

queries on the scope of an aider/abettor's liability under the felony-murder instructions. State ER 347-363. The trial court either resubmitted or referred the jurors back to the same instructions which erroneously indicated that felony-murder liability attached even to someone who joined in the robbery only after the murder by assisting the robber/killer in his flight with the stolen goods. App. 59a-63a.

The judge stated he was "unable to answer" the jurors' question whether aiding/abetting required "'knowledge of the purpose' ... prior to ... or during the commission of the crime." As the district court commented, "This question goes to the crux of the timing element of aiding and abetting felony murder about which the California Supreme Court later found the jury was incorrectly instructed." App. 61a.

The jurors also submitted two diagrams representing alternative understandings of the criteria for felony-murder liability and asked "which is correct?" State ER 357-359. As the district court summarized, one of those alternatives would have allowed felony-murder liability "if [Pulido] only 'facilitate[d] by aiding.' Because the definition of aiding contained in the felony murder and robbery instructions omitted the crucial timing element, this prong would not represent a legally correct option. The court did not remedy this misconception or otherwise dispel the jury's confusion," but "simply refer[ed] the jurors back to the erroneous instruction which prompted their questions in the first place..." App. 62a-63a.[22]

---

[22] As Judge Thomas noted, "this question demonstrates that at least some jurors believed that Pulido developed knowledge and intent only after the actual theft had occurred..." App. 22a-23a.

"When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946). But the judge's responses here were either uninformative or made things worse by underscoring the notion that felony-murder liability extended to anyone who aided in the robbery. Because the unanswered questions reveal that the jurors had focused on the erroneous theory, a finding of prejudice is inexorable. *Ibid.*; *Shafer v. South Carolina*, 532 U.S. 36, 52-53 (2001); *Simmons v. South Carolina*, 512 U.S. 154, 160, 170 fn. 10 (1994).

Especially when these jurors' queries are considered with the other factors discussed here, it is manifest that there is "grave doubt" and thus that the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal*, 513 U.S. at 438; *Brecht*, 507 U.S. at 637.

****

Because the result will be the same under either a categorical prejudice standard (limited to the *Stromberg* inquiry) or under a more broad totality-of-circumstances review (as in the district court opinion), this case would be an unsuitable one for this Court to pick to resolve any questions concerning the viability of the *Stromberg* rule or its relation to *Brecht* prejudice analysis. This Court's usual practice is to avoid deciding any such broad question, involving reconsideration of its own precedents, where it is possible to resolve a matter on more narrow, case-specific grounds. Were it to grant certiorari, the Court would have to conduct a fact-

intensive review of the record, because a finding of prejudice under a totality-of-circumstances analysis would moot the *Stromberg*-related questions.

There is no cause for reconsideration of *Stromberg* and its progeny. The *Stromberg* rule is consistent with the lessons of this Court's "structural defect" cases (such as *Sullivan v. Louisiana*) *and* of its harmless error authorities (such as *Neder v. United States* and *O'Neal v. McAninch*). But, even if the Court believes that some re-examination of *Stromberg* may be in order, this is not the case to do it, because the disposition here would be the same under any form of prejudice analysis.

CONCLUSION

For the foregoing reasons, respondent Michael Pulido respectfully urges this Court to deny a writ of certiorari.

Dated: December 26, 2007

Respectfully submitted,

J. BRADLEY O'CONNELL
Assistant Director
Counsel of Record for Respondent

REPLY BRIEF

79

(3)

COPY

No. 07-544

In the Supreme Court of the United States

FILED

JAN 10 2008

OFFICE OF THE CLERK
SUPREME COURT

CHRIS CHRONES, WARDEN, *Petitioner*,

v.

MICHAEL ROBERT PULIDO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
Fax: (415) 703-1234
Counsel for Petitioner

TABLE OF CONTENTS

	Page
PETITIONER'S REPLY BRIEF	1
1. CERTIORARI IS REQUIRED TO DECIDE WHETHER *STROMBERG* v. *CALIFORNIA* CONSTITUTES CLEARLY ESTABLISHED PRECEDENT AFTER *ROSE* v. *CLARK*	1
2. RESPONDENT FAILS TO HARMONIZE *STROMBERG* WITH THIS COURT'S MODERN HARMLESS ERROR JURISPRUDENCE	3
3. THE NINTH CIRCUIT'S RULE CONFLICTS WITH THE RULE IN FOUR CIRCUITS	5
4. THE NINTH CIRCUIT'S STRUCTURAL-ERROR RULE IS INCONSISTENT WITH THE DEFERENTIAL FEDERAL HABEAS REVIEW REQUIRED IN THIS AND MANY CASES	7
5. *BRECHT* REQUIRES A FINDING OF HARMLESS ERROR	8
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
Cases	
Arizona v. *Fulminante* 499 U.S. 276 (1991)	2
Becht v. *United States* 408 F.3d 541 (8th Cir. 2005)	6
Brecht v. *Abrahamson* 507 U.S. 619 (1993)	7-10
Calderon v. Coleman 525 U.S. 141 (1998)	5
California v. Roy 519 U.S. 2 (1996)	3
Chapman v. *California* 386 U.S. 18 (1967)	7, 8
Estelle v. *McGuire* 502 U.S. 62 (1991)	5
Fry v. *Pliler* __ U.S. __, 127 S. Ct. 2321 (2007)	7, 8
Griffin v. *United States* 502 U.S. 46 (1991)	2, 6
Lara v. *Ryan* 455 F.3d 1080 (9th Cir. 2006)	1, 8

TABLE OF AUTHORITIES (continued)

	Page
Mills v. *Maryland* 486 U.S. 367 (1988)	2
Neder v. *United States* 527 U.S. 1 (1999)	3-6
Parker v. *Secretary, Dept. of Corrections* 331 F.3d 764 (11th Cir. 2003)	6
Pope v. *Illinois* 481 U.S. 497 (1987)	3, 6
Quigley v. *Vose* 834 F.2d 14 (1st Cir. 1987)	6
Rose v. *Clark* 478 U.S. 570 (1986)	2, 4-6
Sandstrom v. *Montana* 442 U.S. 510 (1979)	1
Stromberg v. *California* 238 U.S. 359 (1931)	1-6
United States v. *Bailey* 405 F.3d 102 (1st Cir. 2005)	6
United States v. *Holly* 488 F.3d 1298 (10th Cir. 2007)	6
Yates v. *Evatt* 500 U.S. 391 (1991)	6

TABLE OF AUTHORITIES (continued)

Page

Yates v. *United States*
354 U.S. 208 (1957) 2

Statutes

United States Code, Title 28
§ 2254 7
§ 2254(d)(1) 7

In the Supreme Court of the United States

No. 07-544

CHRIS CHRONES, WARDEN, *Petitioner,*

v.

MICHAEL ROBERT PULIDO, *Respondent.*

PETITIONER'S REPLY BRIEF

1. CERTIORARI IS REQUIRED TO DECIDE WHETHER *STROMBERG* v. *CALIFORNIA* CONSTITUTES CLEARLY ESTABLISHED PRECEDENT AFTER *ROSE* v. *CLARK*

Respondent's conviction of first degree murder was reversed under the Ninth Circuit's rule that a jury instruction on a legally erroneous alternative theory is structural error requiring the reviewing court to be "absolutely certain" the jury did not rely on the erroneous theory to convict. App. 10a-11a; *Lara* v. *Ryan*, 455 F.3d 1080 (9th Cir. 2006). Its rule traces to *Stromberg* v. *California*, 238 U.S. 359, 368 (1931), which held that reversal is required if one of the multiple grounds for conviction is constitutionally invalid and a reviewing court cannot determine on which ground the jury relied. See *Lara*, 455 F.3d at 1085 (citing *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979), citing

Stromberg).

Respondent contends that *Stromberg* remains clearly established law, despite *Stromberg*'s unresolved dichotomy with this Court's established harmless error test, see *Rose* v. *Clark*, 478 U.S. 570 (1986), and the Court's established principle that structural error is never harmless while trial error can be, see *Arizona* v. *Fulminante*, 499 U.S. 276 (1991). He relies on two post-*Rose* cases: *Mills* v. *Maryland*, 486 U.S. 367, 376 (1988), and *Griffin* v. *United States*, 502 U.S. 46, 55 (1991). Opp. at 9-10. Yet neither decision mentioned *Rose* or *Fulminante*. And neither decision considered whether an erroneous legal theory can be harmless.

Mills interpreted instructions and verdict forms to make a determination of error. Its approving citation of *Stromberg*, see 486 U.S. at 376, involved no consideration of the question petitioner presents here or of the impact of *Rose* on harmless error analysis. *Griffin* merely distinguished *Stromberg*, finding that it does not mandate reversal when an instruction on an alternative factual theory is unsupported by substantial evidence. See *Griffin*, 502 U.S. at 56 (no known case "set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in *Stromberg*, nor even illegal as in *Yates* [v. *United States*], [354 U.S. 208 (1957)], but merely unsupported by sufficient evidence.")

That the Court in two post-*Rose* decisions addressed faulty instructions without the need to consider whether *Rose* undermined *Stromberg* hardly reflects reaffirmation of the latter. Under *Stromberg*, reversal is always required when a reviewing court cannot know whether a conviction rests on an unconstitutional theory. Under *Rose* and its progeny, reversal is *not* always required even when a reviewing court *does* know

that a conviction *does* rest on an unconstitutional theory. That these apparent non-intersecting lines of Supreme Court authority coexist without explanation of one another only highlights the need to resolve the question in this case.

Respondent's Brief in Opposition labors to make these parallel lines of authority intersect. His efforts, like those of the Ninth Circuit, only demonstrate the ever-deepening confusion and incoherence of the Ninth Circuit's "alternate theory" rule.

2. Respondent Fails to Harmonize *Stromberg* with this Court's Modern Harmless Error Jurisprudence

The Ninth Circuit's structural-error rule distinguishes instructions that state an erroneous legal theory from instructions that erroneously state an element needed to convict. See Pet. at 18. *Pope* v. *Illinois*, 481 U.S. 497, 499-503 (1987), however, found instructional error could be harmless even though the infirm instruction gave the jury no choice but to rest a guilty verdict on an unconstitutional theory. Further, *Neder* v. *United States*, 527 U.S. 1, 11-13 (1999), and *California v. Roy*, 519 U.S. 2, 5 (1996), each rejected the notion that an instructional error is structural depending on how the error is labeled. The Ninth Circuit's distinction between legal theory error and other erroneous instructions on elements of the offense is just the kind of artificial labeling *Neder* and *Roy* condemned.

Respondent ignores *Pope* and *Roy* altogether. As for *Neder*, respondent views that decision as only a short jump from *Stromberg*. He reads *Neder* as holding that an erroneous instruction on an element of an offense requires reversal when the evidence of the element is

"contested," see 527 U.S. at 19, and concludes that "the same is true [per *Stromberg*] of a reviewing court's uncertainty whether the jurors based their verdict on an unconstitutional ground." Opp. at 12-13. But *Neder*'s reference to the circumstance of a "contested" element as an "example" did not formulate a precise test for determining if instructional error is actually harmless. See *Rose* v. *Clark*, 478 U.S. at 583-84 (the fact that defendant denied acting with the requisite intent "does not dispose of the harmless error question."). The harmless error test also must take account, indispensably, of the findings the jury actually made. Here, if the jury found with respect to the "special circumstance" that respondent aided the robbery during the killing, the erroneous failure to find the contemporaneity element of aiding and abetting felony murder would be harmless—as petitioner tacitly acknowledges, Opp. at 18—even though respondent contested the contemporaneity element and raised evidence sufficient to support a finding in his favor. In such manner, a jury finding can render an instructional error harmless regardless of the evidence in the defendant's favor because the finding shows that the jury rejected that evidence and, thus, would have made the required finding under a proper instruction.

More generally, respondent's analysis confuses two inquires that *Neder* kept separate: (1) can instructional error be harmless and, (2) if so, was it actually harmless? See *Neder*, 527 U.S. at 8-15 (instructional omission of an element may be harmless error); *id.* at 15-20 (error actually harmless). To say, as *Neder* does, that an instructional error may prove to be prejudicial depending upon the evidence, is not to say, as *Stromberg* does, that an unconstitutional instruction must be prejudicial when the jury may have relied on it. By

collapsing the question of whether an error can be harmless into the question of whether an error actually is harmless, respondent and the Ninth Circuit conflate error and harm. Error occurs when the jury misapplies the law. *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991). Harm occurs when a reviewing court cannot conclude that the result would have been the same had the jury not misapplied the law. *Neder*, 527 U.S. at 18.

In sum, respondent attempts to harmonize *Neder* with *Stromberg* not only by confusing the apples of harm with the oranges of error but by substituting fake apples (i.e., an incorrect prejudice test) for the real thing. Even if *Stromberg* in the unconstitutional-theory context itself conflated error with harm, like the Ninth Circuit did with the instructions in this case, certiorari is warranted because *McGuire*, *Rose*, and *Rose*'s several progeny, including *Neder*, firmly and clearly separate those two concepts. See *Calderon* v. *Coleman*, 525 U.S. 141, 146-147 (1998) (per curiam) (the test for instructional error "is not a substitute for the *Brecht* harmless-error test").

3. The Ninth Circuit's Rule Conflicts with the Rule in Four Circuits

Respondent asserts, "The *Stromberg* rule is alive and well in other circuits." Opp. at 14. He cites three decisions, none of which consider *Stromberg* in light of *Rose*. Thus, respondent fails to refute petitioner's demonstration that the latter decision undermines the former.

Respondent finds support, in two of the circuit decisions cited by petitioner, for the principle that "'[a]n error with regard to one independent basis for the jury's verdict cannot be rendered harmless solely because of the availability of the other basis,' for that would

'eviscerate[]' the *Stromberg* rule." Opp. at 15 (citing *United States* v. *Holly*, 488 F.3d 1298, 1306-07 (10th Cir. 2007), and *Parker* v. *Secretary, Dept. of Corrections*, 331 F.3d 764, 778 (11th Cir. 2003)). The cited limitation on harmless error analysis is correct, but it is one that *Rose* imposes as firmly as *Stromberg*. See *Yates* v. *Evatt*, 500 U.S. 391, 399, 406 (1991) (state supreme court misapplied harmless error test when it asked whether jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice). That *Rose* and *Stromberg* can produce identical results in some cases hardly resolves the conflict between the two. Moreover, both *Holly* and *Parker* used *Rose*, not *Stromberg*, to govern harmless error analysis when, as here, a jury could have convicted based on a legally erroneous theory. *Quigley* v. *Vose*, 834 F.2d 14 (1st Cir. 1987), established the same approach in the First Circuit. Respondent contends that *United States* v. *Bailey*, 405 F.3d 102, 109-10 (1st Cir. 2005), "recognize[s] the continued vitality of the *Stromberg* rule in the First Circuit" (Opp. at 15, n. 13), yet *Bailey* mentioned neither *Stromberg* nor *Rose* and simply found no error.

Respondent seeks to distinguish *Becht* v. *United States*, 408 F.3d 541 (8th Cir. 2005), another decision cited by petitioner as evidence of a circuit split, by characterizing it as a *Griffin* case based on insufficient evidence supporting the erroneous theory on which the jury was instructed. Opp. at 16. But *Becht* only obliquely mentioned *Griffin* and forthrightly stated that in alternate legal theory cases *Stromberg* governs only the question of error, whereas *Rose*, *Pope*, and *Neder*

govern prejudice. *Id.* at 548-49.

4. The Ninth Circuit's Structural-error Rule Is Inconsistent with the Deferential Federal Habeas Review Required in this and Many Cases

Respondent argues that the application of the forgiving *Brecht* v. *Abrahamson* harmless-error test on habeas corpus (as required by *Fry* v. *Pliler*, __ U.S. __, 127 S. Ct. 2321, 2328 (2007)) subsumes the question of whether the state court reasonably applied the stricter test of *Chapman* v. *California*. He ignores the fact that in this case the Ninth Circuit has replaced both *Brecht* and *Chapman* with its "absolute certainty" test of structural error.

Fry v. *Pliler* held:

> [I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht*, 507 U.S. 619 . . . [631 (1993)] whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in *Chapman* [v. *California*], 386 U.S. 18 . . . [1967].

Fry noted that it may be unnecessary for a federal habeas court to decide (as otherwise required under § 2254(d)(1)) whether the state appellate court unreasonably applied clearly established federal law, namely, the *Chapman* standard. *Fry*, 127 S. Ct. at 2327. To respondent, "*Fry* . . . has rendered § 2254(d)(1) largely irrelevant to a habeas court's assessment of whether constitutional error was prejudicial." Opp. at 17. The argument puts respondent in a self-

contradictory position. He claims that the predominance of *Fry* in the harmless error field makes review of the Ninth Circuit's rule unnecessary, yet he approves of the rule for undercutting the predominance of *Fry* by making it irrelevant to the prejudice question in this case and in a myriad of other instructional error cases.

In the Ninth Circuit, the supposed rule that "alternate legal theory" error is structural has two main consequences. First, on direct appeal of federal convictions, "absolute certainty," not *Chapman*, is the mandated harmless error standard. Second, on federal habeas review of state convictions, "absolute certainty" replaces the *Brecht* test—notwithstanding *Fry*. The latter has particularly significant impact because the test for harmless error under *Brecht* differs enormously from the Ninth Circuit's "absolute certainty" test. *Brecht* frequently may permit a finding of harmlessness, as in *Fry* itself. The "absolute certainty" test allows that finding only where, in effect, no error actually occurred because the jury did not rely on the erroneous legal theory. See Cert. Pet. at 18-19; *Lara* v. *Ryan*, 455 F.3d at 1087.

Although it suggests a distinction between its view of "alternate legal theory" instructional error and instructional error involving other elements, the Ninth Circuit's effort to cabin its structural-error rule is largely incoherent. As demonstrated in this case, the elasticity of the rule has great potential to undermine deferential review of harmless error in federal habeas corpus cases.

5. *Brecht* Requires a Finding of Harmless Error

Respondent argues that *Brecht* compels a grant of the writ in his case. Opp. at 22. If that were true, respondent could have no substantial objection to this Court directing the Ninth Circuit to do what it never did: apply *Brecht*. Respondent can maintain his objection only by reformulating the prejudice question as "whether some juror relied on the unauthorized 'late joiner' theory." Opp. at 22.

That is not the prejudice question or, for that matter, even the error question. The jury convicted respondent of felony murder without finding he aided and abetted the robbery before the killing. Whether or not "some juror relied on the . . . 'late joiner' theory," the error was that the jury failed to rule out that theory with respect to felony murder. And the prejudice question focuses not on whether a juror might have relied on the improper theory, but rather on what the jury actually did—weigh evidence, consider arguments, and make findings (right and wrong)—insofar as that shows what the jury would have done under a proper felony-murder instruction. The error is harmless if, given all the relevant circumstances, the jury would have found the contemporaneity element of aiding and abetting felony murder had it been correctly instructed on that element.

All the reasons respondent gives for why the judgment of conviction falls under *Brecht* are overturned with recognition of his fundamental misconception that error is tantamount to prejudice. The most that respondent's five factors show is that the jury erroneously failed to find the contemporaneity element necessary to convict respondent of aiding and abetting felony murder. For example, respondent points to the questions the jury asked about the "late joiner"

theory. Opp. at 25-27. But its questions concerned only felony murder, not the special circumstance. The questions the jury asked only show the error. Failing to distinguish the jury's consideration of the charged crime from its consideration of the special circumstance (even though the jury had to find the first before considering the second), respondent again conflates error and harm.

Noting that the California Supreme Court did not consider the "and/or" defect in one of the special circumstance instructions, respondent argues that court failed to consider all the relevant circumstances in interpreting the jury's special circumstance finding. Opp. at 18-19. Yet, respondent himself fails to interpret the defective instruction in the context of the other instructions, the arguments of counsel, and the evidence. Respondent, like the lower federal courts, ignores the fact that the prosecutor did not rely on the "and/or" defect and even told the jury to apply a standard unduly favorable to the defense. If respondent was not the shooter, the prosecutor said, the special circumstance would be true only if "when the killing occurred, the defendant . . . intended to kill—he knew that was going to happen and he wanted it to happen." ER 271; RT 1663. Respondent also ignores his fingerprint on the Coke can on the front counter inside the store and defense counsel's attempt to substitute an explanation for the manifestly unreasonable one respondent offered—highly probative evidence of pre-killing involvement.

To reconcile his claim of prejudice under *Brecht* with the jury's finding of reckless indifference to human life and major participation in the robbery, respondent deems it significant that the state supreme court did not rely on that finding. Opp. at 23. That court had no need to do so, given its conclusion that the special

circumstance verdict amounted to the missing contemporaneity finding. Respondent notes state case law sustaining a reckless-indifference/major-participant finding based, supposedly, on an accomplice's "'failure to act without knowing whether the victim is dead or still alive' . . . ." Opp. at 23. The jury was not instructed on any such principle and the prosecutor never suggested that mere failure to act could support a finding of reckless indifference and major participation.

* * *

Among all the federal circuit courts of appeal, the Ninth Circuit alone maintains a rule that eviscerates the distinction between structural and trial error in many cases involving instructions on elements of the charged offense. That rule elides the deferential harmless error test applicable to federal habeas corpus. The circuit court's attempted restructuring of harmless error analysis requires review in light of this Court's established law.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted.

Dated: January 9, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JF:sc:er
SF2007402455
40204183.wpd

JOINT APPENDIX

94

No. 07-544

FILED
MAY 12 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CHRIS CHRONES, WARDEN, *Petitioner,*

v.

MICHAEL ROBERT PULIDO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MANUEL MEDEIROS
State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
E-mail: jeremy.friedlander@doj.ca.gov
Counsel for Petitioner

J. BRADLEY O'CONNELL
Assistant Director
Counsel of Record
First District Appellate Project
730 Harrison St., Suite 201
San Francisco, CA 94107
Telephone: (415) 495-3119
E-mail: jboc@fdap.org
Counsel for Respondent

Petition For Certiorari Filed October 12, 2007
Certiorari Granted February 25, 2008

63880 B 632

TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries 1

Clerk's Transcript cover page 4

Jury Instructions

1.00 "Respective Duties of Judge and Jury" (CT 419-20) 5

1.01 "Instructions To Be Considered as a Whole" (CT 421) 7

8.10 "Murder—Defined" (CT 457-458) 8

8.21 "First Degree Felony—Murder" (CT 459) 10

8.27 "First Degree Felony-Murder—Aider and Abettor" (CT 460) 11

8.80.1 "Special Circumstances—Introductory" (CT 461-462) 12

8.81.17 "Special Circumstances—Murder in Commission of" (CT 463) 14

8.83 "Special Circumstances—Sufficiency of Circumstantial Evidence—Generally" (CT 464-465) 15

8.83.1 "Special Circumstances—Sufficiency of Circumstantial Evidence To Prove Required Mental State" (CT 466-467) 17

9.40 "Robbery" (CT 468-469) 19

9.40.1 "Robbery—Aiding and Abetting—When Intent To Abet Must Be Formed" (CT 470) 21

Untitled Instruction Defining "Immediate Presence" (CT 471) 22

9.44(b) Untitled, non-CALJIC Instruction on Duration of Robbery and on Aiding

TABLE OF CONTENTS – Continued

Page

and Abetting Robbery Felony Murder (CT 472-473) 23
9.43 "Second Degree Robbery as a Matter of Law" (CT 474) 25
9.44 "Robbery—When Still in Progress/ Felony Murder" (CT 475) 26
17.19 "Personal Use of Firearm" (CT 484-485) 27
17.20 "Intentional Infliction of Great Bodily Injury" (CT 486-487) 29
3.00 "Principals—Defined" (CT 490) 31
3.01 "Aiding and Abetting—Defined" (CT 501) 32

Selected Notes from the Jury, and Responses from the Trial Judge, during Jury Deliberations

(Note: Generally, these documents appear in the clerk's transcript in the reverse order in which they occurred chronologically. They are presented here in chronological order. Certain pages of the copy of the state clerk's transcript which was lodged in district court included underlining, marginal notations, and other marks made by the Deputy Attorney General. J.A. 41 (CT 614), 43 (CT 612), 45 (CT 610), 46 (CT 611), 48 (CT 607), 51 (CT 603). Because those extraneous notations and other marks do not appear on the original juror notes and responses, the markings and notations are not included in these pages as they have been reproduced for the Joint Appendix.)

Question regarding aiding and abetting; rcv'd 6/29/93 (CT 622) 33
Answer to question regarding aiding and abetting (CT 620) 34

TABLE OF CONTENTS – Continued

Page

—Instruction (CALJIC 3.01) attached to answer (CT 621) 35
Question regarding "felony homicide" definition and attached diagrams; rcv'd 6/29/93 (CT 616-618) 36
—Diagram "A" (CT 617) 37
—Diagram "B" (CT 618) 38
Answer to question regarding "felony homicide" (CT 615, 619 [duplicate?]) 39
Question regarding CALJIC 3.01; rcv'd 6/30/93 (CT 614) 41
Request for copies of special circumstance instructions; rcv'd 6/30/93 (CT 613) 42
Answer to question regarding CALJIC 3.01; 6/30/93 (CT 612) 43
Note from trial court directing jury to replace one page of jury instructions; 6/30/93 (CT 609) 44
—Attached page to be replaced (CT 610) 45
—Attached replacement page (9.44(b)) (CT 611) 46
Request for 12 copies of 9.40.1 and 9.44(b); rcv'd 6/30/93 (CT 608) 47
Question regarding CALJIC 8.27 (no "received" date indication) (CT 607) 48
Answer to question regarding CALJIC 8.27; 6/30/93 (CT 606) 49
Question regarding reference in instructions to Penal Code section 187; rcv'd 7/1/93; answer (CT 604) 50
Question regarding inability to reach unanimous verdicts on firearm use and bodily injury

TABLE OF CONTENTS – Continued

Page

allegations; rcv'd 7/1/93 (CT 603) 51
Note from jury indicating anticipated completion of deliberations; rcv'd 7/1/93 (CT 602) 52
Question regarding return of verdict forms after non-unanimity; rcv'd 7/2/93 (CT 600) 53
Question regarding return of verdict forms for lesser offense after guilty verdict; rcv'd 7/2/93; and trial court's answer (CT 600) 53
Answer to question regarding inability to reach unanimous verdict (CT 601) 54

Selected Verdict Forms
Guilty of robbery (count 2); dated 7/2/93 (CT 657) 55
True finding as to count 1 special circumstance; dated 7/2/93 (CT 658) 56
Guilty of murder (count 1); dated 7/2/93 (CT 659) 57

The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for Writ of Certiorari:

Published opinion by the California Supreme Court, filed May 29, 1997 ..... 101a-120a

Order granting petition for a writ of habeas corpus by United States District Court for the Northern District of California, filed

TABLE OF CONTENTS – Continued

Page

March 24, 2005 ..... 32a-97a

Order denying motion to alter judgment by United States District Court for the Northern District of California, filed April 21, 2005 ..... 98a

Published opinion by Ninth Circuit Court of Appeals (affirming grant of habeas relief), filed May 30, 2007 ..... 1a-24a

Unpublished memorandum decision by Ninth Circuit Court of Appeals (affirming denial of other habeas claims), filed May 30, 2007 ..... 25a

Order denying rehearing and rehearing en banc by Ninth Circuit Court of Appeals, filed July 18, 2007 ..... 31a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 16, 1999 – Petition for writ of habeas corpus filed in United States District Court for the Northern District of California

March 30, 2001 – Order by district court denying respondent warden's motion to dismiss

April 24, 2001 – Answer and exhibits filed by warden in district court

April 25, 2001 – Memorandum of points and authorities filed by warden in district court

May 30, 2001 – Traverse to answer filed in district court

March 24, 2005 – Order by district court granting petition for a writ of habeas corpus

March 24, 2005 – Judgment entered in district court in favor of petitioner Pulido with respect to his claim of instructional error; judgment entered in favor of warden with respect to all other claims

April 4, 2005 – Motion to alter judgment, and supporting points and authorities, filed by warden

April 21, 2005 – Order by district court denying warden's motion to alter judgment

May 10, 2005 – Notice of appeal filed by warden

June 23, 2005 – Notice of cross-appeal and motion for

certificate of appealability filed by Pulido

June 23, 2005 – Opening brief filed by warden in United States Court of Appeals for the Ninth Circuit

July 6, 2005 – District court's order granting in part Pulido's certificate of appealability as to cross-appeal

October 26, 2005 – Appellee's and cross-appellant's brief on behalf of Pulido filed in United States Court of Appeals for the Ninth Circuit

January 9, 2006 – Warden's reply brief filed in United States Court of Appeals for the Ninth Circuit

June 13, 2006 – Oral argument held; case submitted

August 1, 2006 – Submission of case withdrawn pending final resolution of *Lara* v. *Ryan* (05-16055); order directing parties to file letter briefs addressing *Lara*

August 24, 2006 – Warden's letter brief filed

August 30, 2006 – Pulido's letter brief filed

May 30, 2007 – Case deemed submitted; published unsigned opinion filed, affirming the judgment; judgment entered

May 30, 2007 – Unpublished memorandum disposition of Pulido's cross-appeal, affirming district court's denial of other habeas claims

June 7, 2007 – Warden's petition for rehearing and rehearing en banc filed

June 14, 2007 – Warden's letter with additional citations filed

July 18, 2007 – Order filed, denying petition for rehearing and rehearing en banc

July 30, 2007 – Order filed, granting warden's motion to stay the mandate pending petition for writ of certiorari; mandate stayed for 90 days

October 17, 2007 – Mandate issued

November 29, 2007 – Order filed, granting warden's motion to recall the mandate

---

COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

MICHAEL ROBERT PULIDO,

Defendant/Appellant./

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF SAN MATEO

HONORABLE WALTER H. HARRINGTON, JUDGE

VOLUME 2

[Pages 419-21, 457-75, 484-87, 490, 501]

VOLUME 3

[Pages 622, 620, 621, 616-18, 615, 619, 614, 613, 612, 609, 610, 611, 608, 607, 606, 604, 603, 602, 600, 601, 657, 658, 659]

[CT] 419

CALJIC 1.00
RESPECTIVE DUTIES OF JUDGE AND JURY

1.00

Ladies and Gentlemen of the Jury:

You have heard all the evidence, and now it is my duty to instruct you on the law that applies to this case.

The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved directly or circumstantially by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second,

you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

[CT] 421

CALJIC 1.01
INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

1.01

If any rule, direction or idea is repeated or stated in different ways in these instructions, no emphasis is intended and you must not draw any inference because of its repetition. Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

CALJIC 8.10
MURDER--DEFINED
(Penal Code s. 187)

8.10

Defendant is accused in Count 1 of the information of having committed the crime of murder, a violation of Penal Code Section 187.

Every person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of a robbery is guilty of the crime of murder in violation of Section 187 of the Penal Code.

In order to prove such crime, each of the following elements must be proved:

1. A human being was killed.

2. The killing was unlawful, and

3. The killing was done with malice aforethought or occurred during the commission or attempted commission of

[CT] 458

a robbery.

A killing is unlawful, if it was neither justifiable nor excusable.

[CT] 459

CALJIC 8.21
FIRST DEGREE FELONY--MURDER

8.21

The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime.

The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

[CT] 460

CALJIC 8.27
FIRST DEGREE FELONY–MURDER–AIDER AND ABETTOR
(Penal Code s. 189)

8.27

If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery, all persons, who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental.

[CT] 461

CALJIC 8.80.1 (1990 New)
SPECIAL CIRCUMSTANCES--INTRODUCTORY
(Penal Code s. 190.2)

8.80.1

If you find the defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true or not true: that the murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit robbery.

The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.

If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstances to be true.

[CT] 462

If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of robbery (Penal Code, s. 190, 2(1) (17) crime) which resulted in the death of a human being, namely Ramon Flores.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether the special circumstance is or is not true on the form that will be supplied.

[CT] 463

CALJIC 8.81.17 (1991 Revision)
SPECIAL CIRCUMSTANCES--MURDER
IN COMMISSION OF
(Penal Code s. 190.2(a) (17))

8.81.17

To find that the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved:

1. The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery; or

2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder.

[CT] 464

CALJIC 8.83
SPECIAL CIRCUMSTANCES--SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE--GENERALLY

8.83

You are not permitted to find a special circumstance alleged in this case to be true based on circumstantial evidence unless the proved circumstance is not only (1) consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence is susceptible

[CT] 465

of two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

[CT] 466

CALJIC 8.83.1
SPECIAL CIRCUMSTANCES--SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE TO PROVE REQUIRED MENTAL STATE

8.83.1

The specific intent or mental state with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only

(1) consistent with the theory that the defendant had the required specific intent or mental state but

(2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.

[CT] 467

If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

[CT] 468

CALJIC 9.40
ROBBERY
(Penal Code s. 211)

9.40

Defendant is accused in Count 2 of the information of having committed the crime of robbery, a violation of Section 211 of the Penal Code.

Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property, is guilty of the crime of robbery in violation of Penal Code Section 211.

In order to prove such crime, each of the following elements must be proved:

1. A person had possession of property of some value however slight,

2. Such property was taken from such person or from

his or her immediate presence,

3. Such property was taken against the will of such person,

4. The taking was accomplished either by force, violence, fear or intimidation, and

5. Such property was taken with the specific intent permanently to deprive such person of the property.

[CT] 470

CALJIC 9.40.1 (1991 New)
ROBBERY--AIDING AND ABETTING--WHEN INTENT TO ABET MUST BE FORMED

9.40.1

For the purposes of determining whether a person is guilty as an aider and abetter to robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety.

[CT] 471

A thing is in the immediate presence of a person if it is so within his reach, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.

[CT] 472

9.44(b)

The commission of the crime of robbery is not confined to a fixed place or a limited time. However, the scope of the "commission" differs depending upon the issue which you are resolving.

For purposes of determining whether the defendant is guilty of robbery as an aider and abettor the robbery continues so long as the stolen property is being carried away to a place of temporary safety. The robbery is complete at the time the perpetrator disposes of the loot or reaches a position of temporary safety with the stolen property.

For purposes of determining whether the defendant is guilty of robbery felony murder the robbery continues until the robber has reached a position of temporary safety, with or without the stolen property.

[CT] 473

As it is used in this instruction, "place of temporary safety" means that a suspect is no longer fleeing from the scene of the crime or trying to escape from his pursuers. A "place of temporary safety" need not be a specific location. Indeed, a "place of temporary safety" may be reached when a suspect is still on the street or in a motor vehicle. In determining whether a suspect has reached a "place of temporary safety," you should consider the following factors:

(1) the suspect's subjective belief as to whether he or she has reached a place of temporary safety; (2) the amount of time which has transpired between the commission of the crime and the apprehension of the suspect; (3) whether the suspect has had an opportunity to dispose of some or all of the loot from the crime; and (4) any other factor which is relevant to a determination of whether the suspect is still fleeing from the scene of the crime or is trying to escape from his pursuers.

[CT] 474

CALJIC 9.43
SECOND DEGREE ROBBERY AS A MATTER OF LAW

9.43

There are two degrees of robbery. If you find the defendant guilty of the crime of robbery, I instruct you that it is robbery in the second degree as a matter of law.

[CT] 475

CALJIC 9.44 (1991 Revision)
ROBBERY--WHEN STILL IN PROGRESS/
FELONY-MURDER

9.44

For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, or whether a robbery has occurred, you are instructed that the commission of the crime of robbery is not confined to a fixed place or a limited period of time.

A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is in possession of the stolen property and fleeing in an attempt to escape. Likewise it is still in progress so long as immediate pursuers are attempting to capture the perpetrator or to regain the stolen property.

A robbery is complete when the perpetrator has eluded any pursuers, has reached a place of temporary safety, and is in unchallenged possession of the stolen property after having effected an escape with such property.

[CT] 484

CALJIC 17.19
PERSONAL USE OF FIREARM
(Penal Code ss. 667.5(c) (8), 1203.06(a) (1) and 12022.5(a))

17.19

It is alleged in Counts 1 & 2 that the defendant[s] _____ personally used a firearm during the commission of the crimes charged.

If you find the defendant[s] _____ guilty of one or more of the crimes charged or an attempt to commit the crimes charged or a lesser and included felony offense, you must determine whether the defendant _____ personally used a firearm in the commission of such felonies.

The word "firearm" includes a pistol. The "firearm" need not be operable.

The term "used a firearm," as used in this instruction, means to display a firearm in a menacing manner, intentionally to fire it, or intentionally to strike or hit a human being with it.

[CT] 485

The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

[CT] 486

CALJIC 17.20
INTENTIONAL INFLICTION OF GREAT BODILY HARM
(Penal Code ss. 667.5(c) (8) and 12022.7)

17.20

It is alleged in the special allegation in count one that in the commission of the crime therein described the defendant Michael Pulido, with the specific intent to inflict such injury, personally inflicted great bodily injury on Ramon Flores.

If you find a defendant guilty of murder, you must determine whether or not such defendant, with the specific intent to inflict such injury, did personally inflict great bodily injury, on Ramon Flores in the commission of murder.

"Great bodily injury" as used in this instruction means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury.

The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it

[CT] 487

is true, you must find it to be not true.

You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

[CT] 490

CALJIC 3.00
PRINCIPALS–DEFINED

3.00

The persons concerned in the [commission] [or] [attempted commission] of a crime who are regarded by law as principals in the crime thus [committed] [or] [attempted] and equally guilty thereof include:

1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or

2. Those who aid and abet the [commission] [or] [attempted commission] of the crime.

[CT] 501

CALJIC 3.01
AIDING AND ABETTING - DEFINED

A person aids and abets the commission of a crime when he or she,

(1) with knowledge of the purpose of the perpetrator and

(2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

[CT] 622

[Handwritten]
Is "aiding and abetting"
a robbery equivalent
to a guilty conclusion
on count 2 of (robbery).

[Stamp]
RECEIVED
JUN 29 1993
DEPT. No. 15

[CT] 620

Memo from
JUDGE WALTER H. HARRINGTON, JR.

[Handwritten]
Answer to Q re aiding
and abetting robbery –

Yes – see attached
copy of instruction 3.01.

Harrington
3:24 p.

[CT] 621

CALJIC 3.01
AIDING AND ABETTING - DEFINED

A person aids and abets the commission of a crime when he or she,

(1) with knowledge of the purpose of the perpetrator and

(2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

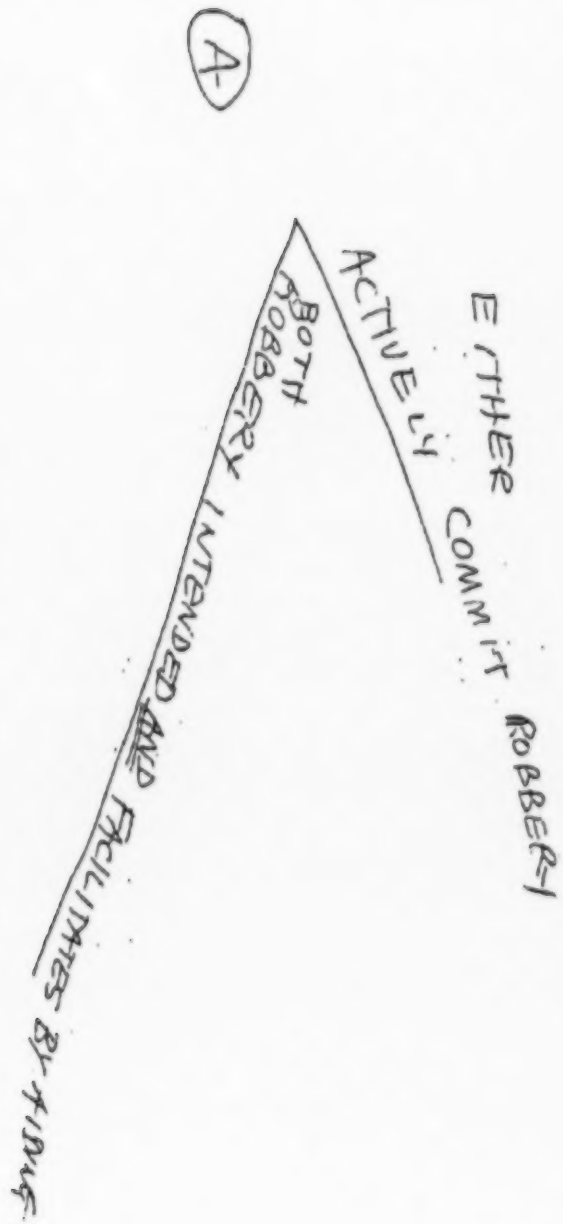
Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

FELONY HOMICIDE
DEFITION IS
UNCLEAR TO US
CALJIC 8.27 (5189)
ATTACHED ARE TWO
DIFFERENT INTEPRETATIONS
OF THE MEANING OF
THE SENTENCE. WHICH
IS CORRECT? (A) OR
(B)

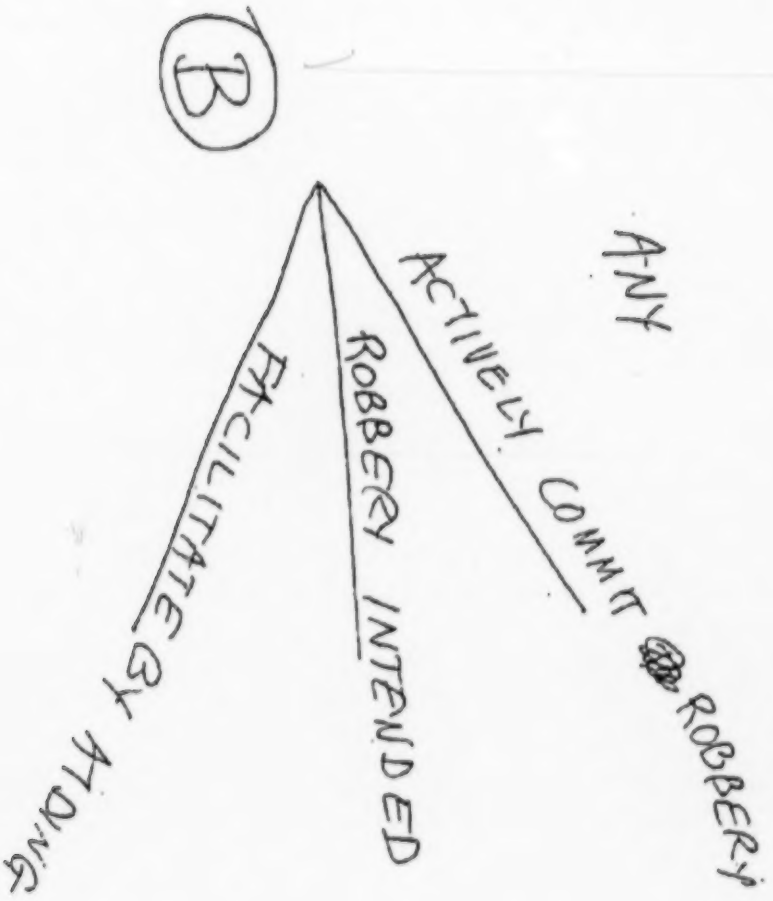
BEST AVAILABLE COPY

[CT] 617



RECEIVED
JUN 2 9 1993
DEPT. No. 15

[CT] 618


B
ANY
ACTIVELY COMMIT ROBBERY
ROBBERY INTENDED
FACILITATE BY AIDING

[CT] 615

Memo from
JUDGE WALTER H. HARRINGTON, JR.

[Handwritten]
Answer to Felony Homicide
Question [*unclear symbol*] 8.27:

[*unclear symbol*] We suggest you reread
8.27 with the definition
of aiding and abetting in
mind from instruction 3.01

Harrington
3:26 p.

[CT] 619

Memo from
JUDGE WALTER H. HARRINGTON, JR.

[Handwritten]
Answer to Felony Homicide
Question [*unclear symbol*] 8.27:

[*unclear symbol*] We suggest you reread
8.27 with the definition
of aiding and abetting in
mind from instruction 3.01

Harrington
3:26 p.

[CT] 614

[Handwritten]
Re: 3.01 (1)

Does point 1 imply that the "knowledge of the purpose" is knowledge prior to the commission of the crime or during the commission of the crime?

[Stamp]
RECEIVED
JUN 30 1993
DEPT. No. 15

[CT] 613

[Handwritten]
12 copies of instructions
Special circumstances –
for both
Count 1 and
Count 2.

[CT] 612

Memo from
JUDGE WALTER H. HARRINGTON, JR.

[Handwritten]
Re interpretation of 3.01 –

We are unable to answer
the question as to an
implication of whether
"knowledge of unlawful purpose"
must be before or during –

You should read 3.01
for its plain meaning in
relation to all the other
instructions bearing on this
point.

Harrington
11:30
6-30-93

[CT] 609

Memo from
JUDGE WALTER H. HARRINGTON, JR.

[Handwritten]
Enclosed is a corrected
page to be inserted
in lieu of the 2nd
page after 9.40.1

incorrect,
Remove the ~~erroneous~~
erroneous instruction
and insert this new page 9.44(b).

Harrington
2^{10} p
6-30-93

[CT] 610

[Handwritten]
REPLACED 6/30 PM
BY 9.44(b)

[Typed]

The commission of the crime of robbery is not confined to a fixed place or a limited time. However, the scope of the "commission" differs depending upon the issue which you are resolving.

For purposes of determining whether the defendant is guilty of robbery as an aider and abettor the robbery continues so long as the stolen property is being carried away to a place of temporary safety. The robbery is complete at the time the perpetrator disposes of the loot or reaches a position of temporary safety with the stolen property.

For purposes of determining whether the defendant is guilty of robbery felony murder inflicted great bodily injury during the commission of a robbery the robbery continues until the robber has reached a position of temporary safety, with or without the stolen property.

[CT] 611

9.44(b)

The commission of the crime of robbery is not confined to a fixed place or a limited time. However, the scope of the "commission" differs depending upon the issue which you are resolving.

For purposes of determining whether the defendant is guilty of robbery as an aider and abettor the robbery continues so long as the stolen property is being carried away to a place of temporary safety. The robbery is complete at the time the perpetrator disposes of the loot or reaches a position of temporary safety with the stolen property.

For purposes of determining whether the defendant is guilty of robbery felony murder the robbery continues until the robber has reached a position of temporary safety, with or without the stolen property.

[CT] 608

[Handwritten]
12 COPIES
9.40.1 (1991 NEW)
(NEW) 9.44 (b)

[Stamp]
RECEIVED
JUN 30 1993
DEPT. No. 15

[CT] 607

[Handwritten]
Re: 8.27

Do the words on line 4
"actively commit the
act constituting such
crime" refer to the
robbery or murder?

Do the words "aid . . .
its commission" from
lines 8 & 9 refer to
the robbery or the
murder?

[CT] 606

Memo from
JUDGE WALTER H. HARRINGTON, JR.

[Handwritten]
In answer to your question
"such crime" refers to robbery
mentioned in the previous line of
instruction 8.27

Harrington
4^{06} 6-30-93

[Handwritten]
The instructions refer to P.C. section 187. The Verdict form refers to P.C. section 187(a). Is there any difference in substance? If yes, we need copies.
No

Harrington
7-1-93 12^{00}

[Stamp]
RECEIVED
JUL 01 1993
DEPT. No. 15

[CT] 603

[Handwritten]
If we are unable to
get unanimous agreement
on the use of a firearm
and the "bodily injury" issues
in either count 1 or count 2,
would this negate unanimity
on the main counts
themselves.

[Stamp]
RECEIVED
JUL 01 1993
DEPT. No. 15

[CT] 602

[Handwritten]
We anticipate completing
our deliberations tomorrow,
Friday, July 2.

[Stamp]
RECEIVED
JUL 01 1993
DEPT. No. 15

[CT] 600

[Handwritten]
If we are not unanimous about the firearm or "bodily injury" special findings on either count 1 or count 2, should we return all (8) related forms unsigned?
See Answer attached.

[Stamp]
RECEIVED
JUL 02 1993
DEPT. No. 15

[Handwritten]
If we declare a guilty verdict for either count 1 or count 2, should we then return the "accessory after the fact forms" (all unsigned.

Yes
Harrington 7-2-93
10[45]

[Stamp]
RECEIVED
JUL 02 1993
DEPT. No. 15

[CT] 601

Memo from
JUDGE WATER H. HARRINGTON, JR.

[Handwritten]
Attached Answer re
special allegation of "firearm"
or "bodily injury" on Cts 1 & 2:

You should reach a
decision – unanimous – if
you can on all issues –
including the special allegations,
before you can be discharged
from the case.

But if the court finds that
you are hopelessly deadlocked
on a particular count or
allegation – then you can be
discharged as th to that
count or allegation and
receive the verdicts to which
you do agree – Harrington

[CT] 657

FILED CMS
SAN MATEO COUNTY
JUL 02 1993
Clerk of the Superior Court
By [/s/ illegible]
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA	)
Plaintiff,	) Dept. 15
vs.	) No. C-29805
	)
MICHAEL ROBERT PULIDO,	) VERDICT
Defendant.	)

WE, THE JURY IN THE ABOVE ENTITLED CAUSE, find the defendant, MICHAEL ROBERT PULIDO, GUILTY of the crime of ROBBERY in violation of Penal Code section 211, as alleged in Count 2 of the Information filed herein.

Dated:
[handwritten]
7-2-93

/s/ Edward Ericson
FOREPERSON

[CT] 658

FILED CMS
SAN MATEO COUNTY
JUL 02 1993
Clerk of the Superior Court
By [/s/ illegible]
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA) Plaintiff,) Dept. 15
vs.) No. C29805
MICHAEL ROBERT PULIDO,) VERDICT
Defendant.)

WE, THE JURY IN THE ABOVE ENTITLED CAUSE, find the special circumstance that the said defendant, MICHAEL ROBERT PULIDO, ENGAGED IN OR WAS AN ACCOMPLICE IN THE COMMISSION OF OR ATTEMPTED COMMISSION OF ROBBERY during the commission of the crime charged in Count 1 of the Information within the meaning of Penal Code section 190.2(a)(17)(1) to be TRUE.

Dated:
[handwritten]
7-2-93

/s/ Edward Ericson
FOREPERSON

[CT] 659

FILED CMS
SAN MATEO COUNTY
JUL 02 1993
Clerk of the Superior Court
By [/s/ illegible]
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA	)
Plaintiff,	) Dept. 15
vs.	) No. C-29805
	)
MICHAEL ROBERT PULIDO,	) VERDICT
Defendant.	)

WE, THE JURY IN THE ABOVE ENTITLED CAUSE, find the defendant, MICHAEL ROBERT PULIDO, GUILTY of the crime of MURDER IN THE FIRST DEGREE OF RAMON FLORES in violation of Penal Code section 187(a), as alleged in Count 1 of the Information filed herein.

Dated:
[handwritten]
7-2-93

/s/ Edward Ericson
FOREPERSON

PETITIONER'S BRIEF

94

(6)

No. 07 544

Supreme Court, U.S.
FILED
MAY 12 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

CHRIS CHRONES, WARDEN, *Petitioner,*

v.

MICHAEL ROBERT PULIDO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MANUEL MEDEIROS
State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
E-mail: jeremy.friedlander@doj.ca.gov
Counsel for Petitioner

03379 A

QUESTION PRESENTED

Stromberg v. *California*, 283 U.S. 359 (1931), required the reversal of the judgment if a general verdict could have rested on an instruction that defined a constitutionally defective alternative theory of criminal liability. However, a modern line of cases, including *Neder* v. *United States*, 527 U.S. 1 (1999), establishes that error in instructing on an element of a charged crime is not "structural error," so as to require automatic reversal, but is instead "trial error" and, as such, may be harmless.

The question presented is:

Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it?

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Relevant statutory provisions 2

Statement of the case 2

Summary of argument 11

Argument 14

The state supreme court did not act contrary to this Court's "clearly established" law by reviewing the instructional error for harmlessness 14

A. Under this Court's modern instructional error cases, the instructional error here was only trial error. 17

1. The error here was indistinguishable from the instructional errors this Court has found to be trial errors and was not comparable to those this Court has found to be structural. 19

2. The error here did not meet this Court's definition of structural error. 24

TABLE OF CONTENTS (continued)

Page

3. An error cannot become structural simply because it can be characterized as "alternative legal theory error." 26

B. *Stromberg* is inconsistent with the Court's modern harmless error cases. 28

1. The concept of prejudice from constitutional instructional error has fundamentally changed from any concept of prejudice that might be attributed to *Stromberg*. 29

2. This Court has never indicated that *Stromberg* can be reconciled with the Court's modern harmless error rules, and *Pope* v. *Illinois* shows that it cannot be. 31

3. The Ninth Circuit's variant on *Stromberg* is inconsistent with this Court's modern harmless error approach. 33

4. Because alternative-legal-theory error is an unbounded principle, the Ninth Circuit's *Stromberg*-based rule subverts this Court's modern harmless error principles. 36

Conclusion 39

TABLE OF AUTHORITIES

Page

Cases

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 23
Arizona v. *Fulminante*, 499 U.S. 279 (1989) 16, 17, 25
Bachellar v. *Maryland*, 397 U.S. 564 (1970) 29
Becht v. *United States*, 403 F.3d 541 (8th Cir. 2005) .. 16, 27
Bollenbach v. *United States*, 326 U.S. 607 (1946) 29
Boyde v. *California*, 494 U.S. 370 (1990) 18, 32, 36
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) .....*passim*
Butler v. *McKellar*, 494 U.S. 407 (1990) 15
California v. *Roy*, 519 U.S. 2 (1996) 17, 20-22,24, 27, 35
Carella v. *California*, 491 U.S. 263 (1989) . .17, 20, 22, 24, 35
Carey v. *Musladin*, 549 U.S. 70, 127 S.Ct. 649 (2006) 35
Chapman v. *California*, 386 U.S. 18 (1967) . .8, 17, 29, 37, 38
Estelle v. *McGuire*, 502 U.S. 62 (1991) 18, 36
Ficklin v. *Hatcher*, 177 F.3d 1147 (9th Cir. 1999) 34, 37
Fry v. *Pliler*, 551 U.S. _,
127 S.Ct. 2321 (2007).....11, 14, 16, 37
Gray v. *Netherland*, 518 U.S. 152 (1996) 18
Griffin v. *United States*, 502 U.S. 46 (1991) 32
Keating v. *Hood*, 191 F.3d 1053 (9th Cir. 1999) ... 16, 34, 37
Kotteakos v. *United States*, 328 U.S. 750 (1946) 16, 21
Lara v. *Ryan*, 455 F.3d 1080 (9th Cir. 2006) ..... *passim*
Lockyer v. *Andrade*, 538 U.S. 63 (2003) 15
Martinez v. *Garcia*, 379 F.3d 1034 (9th Cir. 2004) 37
Mills v. *Maryland*, 486 U.S. 367 (1988) 31, 32
Mitchell v. *Esparza*, 540 U.S. 12 (2003) 15, 16, 23, 24, 35
Neder v. *United States*, 527 U.S. 1 (1999) ..... *passim*
People v. *Pulido*, 15 Cal. 4th 713, 936 P.2d 1235 (1997) . . .1
Pope v. *Illinois*, 481 U.S. 497 (1987) ..... *passim*
Pulido v. *Chrones*, 487 F.3d 669 (9th Cir. 2007) 1

TABLE OF AUTHORITIES (continued)

Page

Quigley v. *Vose*, 834 F.2d 14 (1st Cir. 1987) 16, 27
Rose v. *Clark*, 478 U.S. 570 (1986) ..... *passim*
Rose v. *Lundy*, 455 U.S. 509 (1982) 18
Sandstrom v. *Montana*, 442 U.S. 510 (1979) 14
Sochor v. *Florida*, 504 U.S. 527 (1992) 32
Sparf v. *United States*, 156 U.S. 51 (1895) 18
Stromberg v. *California*, 283 U.S. 359 (1931) ..... *passim*
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) ..... *passim*
Suniga v. *Bunnell*, 998 F.2d 664 (9th Cir. 1993) 37
Teague v. *Lane*, 389 U.S. 288 (1989) 15
United States v. *Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006) 25
United States v. *Holly*, 483 F.3d 1298 (10th Cir. 2007) ... 27
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 18
Washington v. *Recuenco*, 126 S.Ct. 2546 (2006) 17, 22-24, 35
Williams v. *North Carolina*, 317 U.S. 287 (1942) 29
Williams v. *Taylor*, 529 U.S. 362 (2000) 15
Wright v. *Van Patten*, 128 S.Ct. 743 (2008) 15
Yates v. *Evatt*, 500 U.S. 391 (1991) 17
Yates v. *United States*, 354 U.S. 298 (1957) 29
Zant v. *Stephens*, 462 U.S. 862 (1983) 34, 35

Statutes

California Penal Code
§ 187(a) 2
§ 190.2(a)(17)(A) 2
§ 211 2
§ 1203.075 2
§ 12022.5(a) 2

TABLE OF AUTHORITIES (continued)

Page

Pub. L. No. 104-132, Title I, § 104,
110 Stat. 1218 (1996) 2

United States Code
Title 28
§ 1254(1) 1
§ 2254 ..... 8, 18, 37
§ 2254(d) 1, 15, 28
§ 2254(d)(1) 2, 11, 14, 16, 19

Court Rules

Supreme Court Rule 13.3 1

Other Authorities

Antiterrorism and Effective Death Penalty Act .... *passim*

California Jury Instructions, Criminal
No. 8.27 6
No. 8.80.1 7-9
No. 8.81.17 ..... 8, 9, 10
No. 9.40.1 6

In the Supreme Court of the United States

No. 07-544

CHRIS CHRONES, WARDEN, *Petitioner,*

v.

MICHAEL ROBERT PULIDO, *Respondent.*

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 487 F.3d 669 (9th Cir. 2007) and is reproduced in the appendix to the petition for writ of certiorari. Pet.App. 1a. The opinion of the United States District Court is reproduced in that appendix as well. Pet. App. 32a. The opinion of the California Supreme Court is reported at 15 Cal. 4th 713, 936 P.2d 1235 (1997), and reproduced in the appendix to the petition. Pet. App. 101a.

JURISDICTION

The court of appeals issued its decision on May 30, 2007. Pet. App. 1a. It denied petitioner's timely petition for rehearing and rehearing en banc on July 18, 2007. Pet. App. 31a. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

RELEVANT STATUTORY PROVISIONS

Section 2254(d)(1) of Title 28 of the United States Code provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218 (1996).

STATEMENT OF THE CASE

1. A jury convicted respondent of first-degree murder, Cal. Penal Code § 187(a); robbery, Cal. Penal Code § 211; and two car thefts unrelated to the other crimes. The jury also found, as a "special circumstance," that respondent committed the murder in the course of robbery, Cal. Penal Code § 190.2(a)(17)(A). J.A. 55-57; CT 657-59. The jury deadlocked on allegations that respondent personally used a gun, Cal. Penal Code § 12022.5(a), and personally inflicted great bodily injury, Cal. Penal Code § 1203.075, in committing the murder and robbery. CT 360-61. Respondent was sentenced to life imprisonment without possibility of parole. CT 735.

The state supreme court summarized the trial evidence:

> Sometime between 1 a.m. and 5:30 a.m. on May 24, 1992, Ramon Flores, the cashier at a Shell gas station in San Mateo, was shot in the head with a single .45-caliber bullet, killing him within seconds. A neighbor heard a loud bang coming from the direction of the gas station around 3:45 a.m., then a voice yelling; he could not distinguish words, but told a police detective it sounded like the person was addressing someone else.

A cash register taken from the store was found the next morning in some roadside bushes elsewhere in San Mateo. Defendant's fingerprints were on the cash register, as well as on an unopened can of Coke found on the store counter. No fingerprints of Michael Aragon, who defendant testified committed the killing, were identified on either the can or the register.

Arrested on an unrelated auto theft charge, defendant volunteered that he had information about the Shell station robbery. He led police to a location where they found discarded, unused .45-caliber cartridges, which bore ejection markings resembling those on a cartridge found on the gas station floor. Defendant made a series of inconsistent exculpatory statements to police, blaming the robbery and killing successively on a man named Carlos Vasquez, on a relative of defendant's named Eduardo Alarcon and, finally, on an unidentified Tongan man. In a telephone conversation from jail with his uncle, Michael Aragon, and Aragon's cohabitant, Laura Moore, however, defendant said he was alone during the robbery.

At the time of the killing, defendant was staying with Aragon, Moore and their children in their San Mateo home. While he was staying with them, Aragon, two of the children, and a neighbor saw defendant with a pistol, which the neighbor identified as a .45-caliber Colt. During that time, defendant twice observed that the nearby Shell station would be easy to rob because the attendant was always asleep. Aragon told defendant to get rid of the gun because he, Aragon, was on probation. He had been convicted in 1989 of burglary, possession of cocaine and contributing to the delinquency of a minor.

Aragon and Moore testified that defendant was at home when they went to bed around midnight on May 23, but was gone when they got up at around 3 a.m. to

care for their baby. The next morning, Sunday, May 24, they awoke to find defendant asleep in the living room with his clothes and shoes on. He showed Aragon his wallet and said, "Look unc, almost all ones." Later that day, Moore discovered defendant was carrying a handgun and insisted he and Aragon dispose of it. At her direction, defendant took the gun apart; Moore then boiled the pieces in soapy water and put most of them in a bag, which defendant and Aragon threw away near Candlestick Park. Two pieces that Moore had retained to prevent reassembly were later given to police and identified as fitting a .45-caliber Colt.

After seeing a newspaper article about the killing, Aragon asked defendant if he committed it. Defendant denied he had, but a few days later, when Aragon asked again, defendant admitted the crime. He told Aragon he bought a Coke, then shot Flores in the face, took the register and later threw it in some bushes. In a letter from jail, however, defendant wrote to Moore, "If Michael is reading this, tell him I didn't kill that guy, I was just messing with him."

Defendant testified, blaming Aragon for the killing. Aragon, he stated, had seen where defendant kept the pistol. On the night of May 23, defendant and Aragon went out in Aragon's car; defendant thought the pistol was on the shelf where he usually kept it. They went to Hunters Point, where Aragon bought and smoked some cocaine. They left, but returned later for Aragon to buy and smoke more cocaine. Eventually the two arrived at the Shell station in San Mateo. Aragon went inside, defendant thought for matches or cigarettes. Defendant waited outside. He heard a gunshot and ran into the store. Aragon was holding defendant's gun. Flores was lying on the floor, bleeding from a large bullet wound in his face.

Defendant yelled at his uncle, ran out of the store and got in the passenger seat of the car. A few seconds later, Aragon came out, holding the cash register in his left hand and the gun in his right hand. He threw the register on defendant's lap and drove away.

As they were driving away from the scene, Aragon told defendant to open the register. When defendant did not comply, Aragon pointed the gun at him and insisted. Defendant got a screwdriver from the back of the car and pried the register open. At Aragon's command defendant gave him the money and dumped the register in some bushes by the side of the road. Defendant denied touching a Coke can in the store that night; he suggested he might have touched the can on some earlier occasion when he bought a drink at the store.

The defense also presented evidence casting doubt on Aragon's credibility. While admitting a prior drug possession conviction, Aragon denied he was still using cocaine at the time of the killing. However, Aragon's sister (defendant's aunt) testified he came to her house on Sunday, May 24 or Monday, May 25, at which time he was "on something," but did not smell of alcohol. Her son described Aragon as acting paranoid and smelling of crack cocaine. The sister opined Aragon was a liar and a thief. A police detective testified that, when first interviewed, Aragon said he had gotten up at 12:15 a.m. Sunday to take care of the baby. When Aragon and Moore were later interviewed together at the police station, both said it was around 3 a.m. During a discussion about the time period in which the killing occurred, Aragon said to Moore, "That's when I was with you, remember?"

Pet. App. 102a-105a.

The prosecutor argued to the jury that respondent acted alone, RT 1684; see RT 1665-66 ("Michael Aragon was not

there"), but that respondent was guilty of felony murder whether he was the shooter or an aider and abettor. RT 1658-59, 1718. Defense counsel argued that respondent was only an accessory because he helped Aragon dispose of evidence after the robbery. RT 1710-11.

2. In his state appeal, respondent contended that the trial court erred by failing to instruct the jury that he was not liable for murder as an accomplice if he formed the intent to aid and abet the robbery only after Flores was killed. Pet. App. 105a. Resolving a conflict in California decisions, the California Supreme Court held that an accomplice is not guilty of felony murder if he joins a robbery only after a killing occurs in the commission of the robbery. Pet. App. 101a-102a, 105a-106a, 110a, 115a. The state supreme court's opinion described ambiguity on this "late joiner" or "contemporaneity" issue in two principal instructions given to the jury in respondent's case, CALJIC No. 8.27 (J.A. 11) and CALJIC No. 9.40.1 (J.A. 21):

> Unmodified, CALJIC No. 8.27 appears to tell the jury that an aider and abettor in an enumerated felony . . . is liable for first degree murder in a killing committed by anyone else engaged in the felony. In combination with the . . . instruction concerning the duration of a robbery (CALJIC No. 9.40.1), CALJIC No. 8.27 could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule.

Pet. App. 118a-119a.

The state court did not decide if the instructions were erroneous in respondent's case. Citing the jury's separate special-circumstance verdict, the court concluded that "the omitted issue was resolved adversely to defendant under other, properly given instructions." Pet. App. 102a, 120a. The court explained:

> [T]he jury was instructed that the robbery-murder

special-circumstance allegation could not be found true unless defendant was engaged in the robbery *at the time of the killing.* In a modified form of CALJIC No. 8.80.1 . . . the jury was directed to determine whether or not "the murder was committed *while the defendant was engaged or was an accomplice in*" robbery, attempted robbery or the immediate flight from robbery. (Italics added.)[1/] In the special

---

1. CALJIC No. 8.80.1 stated in pertinent part:

If you find the defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true or not true: that the murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit robbery.

. . .

If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstances [*sic*] to be true.

If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of robbery (Penal Code, s. 190, 2(1) (17) crime) [*sic*] which resulted in the death of a human being, namely Ramon Flores.

In order to find a special circumstance

> circumstance verdict, consistently with this instruction, the jury found "that the said defendant... engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission of crime charged in count 1* [murder]." (Italics added.) By its special circumstance verdict the jury thus found—explicitly, unanimously and necessarily—that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores.

Pet. App. 116a (bracketed footnote added). See also J.A. 56-57, CT 658-59.

The court unanimously affirmed the judgment of conviction. Pet. App. 102a, 120a.

3. Respondent sought federal habeas corpus relief under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA). J.A. 1. In 2005, the district court granted the writ. Pet. App. 32a, 97a. It held that the trial court's failure to instruct on the late-joiner aspect of accomplice liability for felony murder was federal constitutional error. Pet. App. 51a. The district court next found that the state supreme court's conclusion of harmless error was contrary to *Chapman* v. *California*, 386 U.S. 18 (1967), and objectively unreasonable. Pet. App. 52a-67a. Although the state court relied on the special-circumstance verdict as explicit proof that the jury indeed found that respondent had participated in the robbery prior to or during the homicide, the district judge concluded that a typographical error in one of the special-circumstance instructions, CALJIC No. 8.81.17, made it possible for the

---

> alleged in this case to be true or untrue, you must agree unanimously.

J.A. 12-13; CALJIC No. 8.80.1 (1990 New); CT 461-62.

jury to return the special-circumstance verdict without making the finding of contemporaneity.[2]

The district court disagreed with petitioner's further harmless error argument: that, under CALJIC No. 8.80.1, see *ante*, n. 1, the jury could not have found that respondent acted with reckless indifference to human life and as a major participant in the robbery, as required for the special circumstance, without also having found that he aided the robbery before or during the killing. Pet. App. 57a-59a. The district court concluded that the error in the felony-murder instruction had a substantial and injurious effect on the jury's verdict under *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993). Pet. App. 65a-67a.

4. The court of appeals affirmed the district court judgment in a per curiam opinion. Pet. App. 1a-15a. Focusing on the typographical error in CALJIC No. 8.81.17, the court of appeals rejected the state supreme court's reliance upon the special-circumstance verdict for its harmless error finding. "Paradoxical though it may seem," the panel stated, "the erroneous explanation in

---

2. The district court perceived "confusion created when the language of the special circumstance verdict form and the special circumstance instruction are considered together." Pet. App. 56a. Because the trial court substituted "or" for "and" in CALJIC No. 8.81.17 (Pet. App. 8a-9a, n.4), a mistake the California Supreme Court had not detected, the district court found that the jury's finding of the special circumstance reflected either of two predicate findings, rather than both (as required): (1) "the murder was committed while the defendant was engaged in . . . the robbery"; or (2) "the murder was committed in order to carry out or to advance the . . . robbery . . . ." Pet. App. 56a. Focusing on the second possibility, the district court concluded that the special-circumstance verdict did not necessarily represent a jury finding that respondent had joined the robbery before or during the killing. Pet. App. 56a-57a. The mis-worded instruction, the court held, undermined the state supreme court's conclusion that the special-circumstance verdict form showed that the jury had resolved the late-joiner issue. Pet. App. 56a, 63a-64a.

CALJIC 8.81.17 permitted the jury to find the special circumstance that the murder was committed 'while the defendant was engaged in or was an accomplice in' robbery without in fact finding that the acts were contemporaneous." Pet. App. 10a-11a.

The panel applied the circuit precedent of *Lara* v. *Ryan*, 455 F.3d 1080 (9th Cir. 2006), to the late-joiner error in the accomplice-liability theory of the felony murder instructions. Pet. App. 11a. *Lara* held that (a) a jury instruction is structural error if it states two or more theories and one is legally improper, and (b) "'where a reviewing court cannot determine with absolute certainty whether a defendant was convicted under an erroneous theory' reversal is required." Pet. App. 11a (citing *Lara*, 455 F.3d at 1086). The court of appeals explained:

> Here, the jury instructions leave open the possibility that the jury convicted [respondent] on a legally impermissible theory, namely, that [respondent] joined the robbery only after Flores was killed. The typographical error in the contemporaneity instruction relied upon by the California Supreme Court introduces doubt into any inference to be drawn from the jury's finding as to the special circumstance. Because, unlike in *Lara*, we cannot be "absolutely certain" that the jury found that [respondent]'s crime of robbery was committed contemporaneously with the murder, the verdict must be reversed.

Pet. App. 11a-12a. The court of appeals conducted no harmless error analysis under *Brecht* v. *Abrahamson*.

Judge O'Scannlain concurred specially under compulsion of *Lara*, despite his view that the circuit rule's "attempt to distinguish instructions involving impermissible alternative theories from other instructional errors is logically unsustainable and inconsistent with Supreme Court precedent." Pet. App. 15a. In a separate concurrence, Judge Thomas found *Lara*'s structural error rule

dispositive and "firmly grounded in Supreme Court jurisprudence." Pet. App. 15a-16a, 24a. Alternatively, Judge Thomas found reversal to be "the right result even under a harmless error standard." Pet. App. 15a.

Petitioner sought rehearing and rehearing en banc. J.A. 2. Petitioner cited this Court's intervening decision in *Fry* v. *Pliler*, 551 U.S. __, 127 S.Ct. 2321 (2007). J.A. 3. Rehearing was denied. Pet. App. 31a.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously granted habeas corpus relief on the premise that jury instructions presenting the jury with both a correct and an incorrect theory of guilt are "structural" errors requiring reversal. The panel's decision runs afoul of two habeas corpus principles: the statutory command in 28 U.S.C. § 2254(d)(1) (AEDPA) to review state court decisions deferentially in light of "clearly established Federal law" determined by this Court; and this Court's directive in *Fry* v. *Pliler*, 551 U.S. __, 127 S.Ct. at 2328, to test all trial errors for prejudice under the forgiving "substantial and injurious effect" standard of *Brecht* v. *Abrahamson*, 507 U.S. at 637. The Ninth Circuit's rule that "alternative legal theory error" is "structural error," a rule it derived from *Stromberg* v. *California*, 283 U.S. 359 (1931), is not clearly established law under this Court's modern harmless error precedents. Therefore, the state court did not act "contrary to" this Court's precedents in treating the error as "trial error," which may be harmless, rather than as structural error, which necessarily requires reversal.

1. Unconstitutional instructional error occurred in this case because there was a reasonable likelihood that the jury found respondent guilty of felony murder by using an incorrect theory of accomplice liability—one that did not require the jury to find that respondent had aided and abetted robbery before the killing. Under this Court's

modern jurisprudence, however, most constitutional errors are trial errors subject to traditional harmless error analysis. Instructional errors in the form of improper presumptions, incorrectly described elements, and omitted elements are trial errors. A court is able to review trial error for harmlessness by determining from the record whether the jury would have reached the same verdict in the absence of the error.

Instructions presenting the jury with both correct and incorrect alternative legal theories might be worse than those presenting the jury with "single legal theory error" in the form of the misdescription or omission of an element. The "alternative legal theory error" here was indistinguishable from, and certainly no worse than, misdescribed-element or omitted-element errors this Court has found to be trial error. A reviewing court remains able to judge, in light of the evidence and the jury's findings, whether the error affected the verdict.

In contrast, structural error deprives a reviewing court of any basis in the record from which to determine whether the error was harmless. This Court has identified only two narrow categories of structural instructional error: a defective reasonable doubt instruction and a directed verdict. The error in this case is not remotely comparable to either of those: the record shows a conviction based on a proper definition of beyond a reasonable doubt, and not on a directive from the trial court to convict. The error does not deprive a reviewing court of the ability to conduct a harmless error analysis. Therefore, the California Supreme Court's adjudication of respondent's instructional error claim was not "contrary to" or an "unreasonable application" of this Court's modern cases (beginning with *Rose* v. *Clark*, 478 U.S. 570 (1986)). They recognize that unconstitutional instructions that omit or misdescribe elements of the charged crime remain subject to harmless error review.

2. The Court's modern instructional error cases have also established a doctrinal framework irreconcilable with *Stromberg* and the *Stromberg*-based rule on which the Ninth Circuit relied. When *Stromberg* was decided, seventy-seven years ago, all constitutional error was treated as structural—necessarily prejudicial. Today, the vast majority of constitutional errors are recognized as trial errors—possibly harmless. Review of instructional error has evolved from focusing on the incorrectness of instructions to focusing on the jury's misapplication of instructions, and the concept of prejudice has evolved concomitantly from what the jury *could* have done *with* an incorrect instruction to what the jury *would* have done *without* it.

The Court has never attempted to reconcile *Stromberg* with its modern instructional error cases. At least one modern harmless error case, *Pope* v. *Illinois*, 481 U.S. 497 (1987), conflicts starkly with *Stromberg*. The jury in *Pope* convicted the defendant based on a theory that unconstitutionally criminalized protected speech, yet the error was deemed subject to harmless error analysis. In *Stromberg*, by contrast, the error was reversible simply because the jury might have relied on such a theory.

The Ninth Circuit's *Stromberg*-based rule is inconsistent with the Court's modern cases for the same reasons that *Stromberg* itself is. In *Lara* v. *Ryan*, 455 F.3d at 1085, the Ninth Circuit attempted to reconcile *Stromberg* with this Court's modern harmless error cases. But *Lara* offered only a conclusory assertion that alternative-legal-theory error is structural.

Like *Stromberg* itself, the Ninth Circuit's rule would render this Court's modern harmless error rules incoherent. Because many instructional errors can feasibly be labeled "alternative legal theory error," the Ninth Circuit's rule would illogically transform trial error into structural error. Likewise, the Ninth Circuit's rule

subverts AEDPA's command to review state judgments deferentially under "clearly established" federal law determined only by Supreme Court precedent; and creates a gaping exception to *Fry*'s command to federal habeas courts to apply *Brecht*.

If the Ninth Circuit's rule is this Court's clearly established precedent, state appellate courts will feel constrained to forgo customary harmless error review whenever an instructional error can plausibly be labeled "alternative legal theory error," even though the error in question is functionally indistinguishable from the many instructional errors this Court has found to be trial error only. The result will be more unwarranted reversals of state court judgments.

ARGUMENT

THE STATE SUPREME COURT DID NOT ACT CONTRARY TO THIS COURT'S "CLEARLY ESTABLISHED" LAW BY REVIEWING THE INSTRUCTIONAL ERROR FOR HARMLESSNESS.

Under 28 U.S.C. § 2254(d)(1), a federal habeas court may not grant relief to a state prisoner unless the state court's decision was "contrary to" or "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." Here, the Ninth Circuit held that a trial court commits structural error (i.e., error not susceptible to harmless error review) by instructing the jury on a legally erroneous alternative theory of guilt and that the conviction must be reversed unless the reviewing court is "absolutely certain" that the jury did not rely on the erroneous theory to convict. Pet. App. 11a (citing *Lara* v. *Ryan*, 455 F.3d 1080). The Ninth Circuit's rule of "alternative legal theory error" derives from *Stromberg* v. *California*, 238 U.S. at 368. See *Lara* v. *Ryan*, 455 F.3d at 1085 (citing *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979), which in turn cites

Stromberg).

The Ninth Circuit erred because divergent lines of authority from this Court show that the Ninth Circuit's *Stromberg*-based rule is not "clearly established Federal law" as defined by § 2254(d). See *Wright* v. *Van Patten*, 128 S.Ct. 743, 747 (2008) (per curiam) (when the Court's cases "give no clear answer to the question presented, let alone one in [defendant's] favor, 'it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.'"); *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003) (no clearly established rule exists where Supreme Court cases "exhibit a lack of clarity").[3]

In the older line, beginning with *Stromberg*, the Court automatically reversed judgments when one of multiple possible grounds for conviction was unconstitutional and it was impossible for a reviewing court to tell which ground the jury relied on. In the modern line of cases, culminating with *Neder* v. *United States*, 527 U.S. 1 (1999), the Court has held that most unconstitutional instructional errors,

---

3. *Williams* v. *Taylor*, 529 U.S. 362, 380-84, 412, 416 (2000), held that a court deciding under 28 U.S.C. § 2254(d) whether a rule is clearly established makes the same inquiry as in *Teague* v. *Lane*, 389 U.S. 288 (1989), except that the AEDPA court looks only to Supreme Court jurisprudence. Under *Teague*, a rule is not "dictated by precedent" if a survey of the existing legal landscape shows that the rule is "susceptible to debate among reasonable minds." *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990). As shown in the text, *infra*, the divergence of Supreme Court authority on the issue of how to analyze alternative-legal-theory error demonstrates that the correct approach to this issue is a question susceptible to debate among Supreme Court jurists. Thus, the *Stromberg* approach is neither dictated by precedent nor clearly established.

regardless of how they are characterized, can be reviewed for prejudice. As recognized in several circuits, including the Ninth Circuit, these two lines of Supreme Court precedent have created an unresolved tension in cases of alternative-legal-theory error. *Becht* v. *United States*, 403 F.3d 541, 546-48 (8th Cir. 2005); *Keating* v. *Hood*, 191 F.3d 1053, 1064 n.17 (9th Cir. 1999); *id.* at 1068 (Rymer, J., dissenting); *Quigley* v. *Vose*, 834 F.2d 14, 16 (1st Cir. 1987) (per curiam). At a minimum, this Court's precedent in this area is ambiguous. Accordingly, the state court's decision to choose the path of harmless error review was not unreasonable or contrary to Supreme Court precedent under § 2254(d)(1). See *Mitchell* v. *Esparza*, 540 U.S. at 17.

Having erred under AEDPA by finding the error to be structural and by applying its *Stromberg*-based rule, the Ninth Circuit erred as well by not applying the customary prejudice test for federal habeas cases: the relatively forgiving "substantial and injurious effect" standard set forth in *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), adopted for habeas cases by *Brecht* v. *Abrahamson*, 507 U.S. at 637, and strongly reiterated by *Fry* v. *Pliler*, 127 S.Ct. at 2328 (federal habeas court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the *Brecht* test whether or not the state appellate court recognized the error and reviewed it for harmlessness). Although the Ninth Circuit mentioned the *Brecht* test (Pet. App. 7a n.3), it did not apply it, evidently because the court considered the error to be structural error, which is not tested for prejudice. See *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1989) (structural errors "defy analysis by 'harmless-error' standards"). Because this Court's precedent does not clearly establish that the error here was structural, the error should have been reviewed for harmlessness under *Brecht*.

A. Under this Court's modern instructional error cases, the instructional error here was only trial error.

In its landmark decision in *Chapman* v. *California*, 386 U.S. 18, this Court held that constitutional error can sometimes be harmless. After *Rose* v. *Clark*, 478 U.S. at 579, stated a "strong presumption" that constitutional errors can be harmless, the Court suggested in *Arizona* v. *Fulminante*, 499 U.S. 279, which ones can be and which can never be. *Fulminante* distinguished between "trial error," *id.* at 307, and "structural defects," *id.* at 309. The former can be "quantitatively assessed" in order to determine whether the error was harmless beyond a reasonable doubt, see *id.* at 308, whereas the latter "defy analysis by 'harmless-error' standards," *id.* at 309. See *Neder* v. *United States*, 527 U.S. at 8 (structural error arises only in the "very limited class of cases" that "contain 'a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'").

The Court has repeatedly found instructional errors regarding essential elements of the prosecution's proof to be trial errors subject to harmless error review. Such errors include a mandatory rebuttable presumption, *Yates* v. *Evatt*, 500 U.S. 391 (1991), *Rose* v. *Clark*, 478 U.S. 570, or a mandatory conclusive presumption, *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), that shifts the burden of proof to the defendant on an element of the offense. It is also trial error for a trial court to describe an element incorrectly, *Pope* v. *Illinois*, 481 U.S. 497, to omit an element of the charged crime, *Neder* v. *United States*, 527 U.S. 1, to give an instruction that can be called either a misdescription or an omission of an element, *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam), or to fail to submit a sentencing factor to the jury. *Washington* v. *Recuenco*, 126 S.Ct. 2546 (2006).

By contrast, the Court has specifically found only one instructional error to be structural: an incorrect definition of the "beyond a reasonable doubt" standard that lowers the prosecution's burden of proof. *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). It is apparently also structural error for a trial court to instruct a jury simply to convict the defendant without considering the evidence—a directed verdict. See *Neder*, 527 U.S. at 17 n.2; *Rose*, 478 U.S. at 578; *Sparf* v. *United States*, 156 U.S. 51, 105 (1895).

Instructional error occurred in this case because three factors—(a) ambiguity in the robbery and murder instructions, (b) the trial court's confusing answers to the jury's questions, and (c) the absence of a jury finding that respondent personally inflicted great bodily injury or used a firearm—combined to make it reasonably likely that the jury applied the instructions in an unconstitutional way: convicting respondent of felony murder as an accomplice without finding, as required by state law, that he aided in the robbery before the killing. See *Estelle* v. *McGuire*, 502 U.S. 62, 72 & n.4 on 72 (1991); *Boyde* v. *California*, 494 U.S. 370, 380 (1990).[4] As discussed below, this Court's modern approach to instructional error establishes that the error in this case was trial error only or, at the least, that the state court did not act unreasonably or contrary to this Court's

---

4. The unconstitutional error at issue here is *not* the typographical mistake in the special-circumstance instruction that substituted "or" for "and" in stating some of the elements required for a special-circumstance finding. Respondent did not claim in state court that *that* instruction amounted to prejudicial error either by itself or in conjunction with the instructions on felony murder. He cannot obtain relief by making such a claim for the first time in federal court. See 28 U.S.C. § 2254; *Gray* v. *Netherland*, 518 U.S. 152, 161-62, 165 (1996); *Vasquez* v. *Hillery*, 474 U.S. 254, 260 (1986); *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982). Further, such a claim would not be cognizable now because respondent also failed to raise it either in the federal district court or in his opposition to the petition for certiorari.

approach under § 2254(d)(1) in treating the error as trial error.

1. The error here was indistinguishable from the instructional errors this Court has found to be trial errors and was not comparable to those this Court has found to be structural.

a. Beginning with *Rose*, 478 U.S. 570, the Court found a series of instructional errors to be subject to harmless error analysis. Those instructional errors are indistinguishable from the error here in that none prevented the jury from making findings from which a reviewing court could determine whether the jury would have convicted under proper instructions.

In *Rose*, 478 U.S. at 580, the error impermissibly shifted the burden of proof on an element. Harmless error analysis was required because the erroneous instruction could have been "simply superfluous" in the sense that it did not necessarily prevent the jury from finding "'every fact necessary' to establish every element of the offense beyond a reasonable doubt. [Citation omitted.]" *Id.* at 581. In *Pope* v. *Illinois*, 481 U.S. 497, the erroneous instruction was arguably more serious than the one in *Rose* because it allowed the jury to convict the defendant by finding that he engaged in constitutionally protected conduct. The trial court should have instructed the jury to decide (as the Constitution required) whether a reasonable person would find serious literary, artistic, political, or scientific value in allegedly obscene material. Instead, the trial court told the jury to decide whether ordinary adults in the State of Illinois would view the material as obscene. *Id.* at 499. The instruction was unconstitutional because it allowed the jury to apply a legally erroneous theory—"a state community standard." *Id.* at 503. *Pope* found the error "comparable to" the one in *Rose* because the jurors "were not precluded from considering the question of value" (the element in

question) but were only told to do so under the wrong standard. *Pope*, 481 U.S. at 502-03. The error in this case was no more serious than the one in *Pope* (and, likewise, no more serious than the impermissible presumption in *Rose*) because, at worst, the jury used a legally erroneous standard (post-killing involvement rather than pre-killing involvement) to determine whether respondent aided and abetted felony murder.

In *Carella* v. *California*, 491 U.S. at 264-66, the error was again arguably more serious than the one in *Rose*, this time because the presumption was conclusive rather than merely rebuttable. Again, the difference did not matter. Citing *Rose* for the proposition that predicate facts could have conclusively established the element in question and, thus, could have made the erroneous instruction superfluous, the Court held that the error could be harmless. *Id.* at 266-67. Likewise here, the erroneous instruction was potentially superfluous in the same sense as the offending instructions in *Rose* and *Carella*: it did not prevent the jury from finding predicate facts that could have established aiding and abetting the robbery before the killing. For example, the jury could have based its special-circumstance finding of (at a minimum) major participation in the robbery and reckless indifference to human life on a determination that respondent was a willing and active participant in the robbery from the outset, in which case the jury would have found predicate facts establishing the missing contemporaneity element.

In *California* v. *Roy*, 519 U.S. at 3, a federal habeas case, the trial court erroneously failed to instruct the jury that it could convict the defendant as an aider and abettor only if it found that he intended to aid the confederate's crime. Noting that the error was "as easily characterized as a 'misdescription of an element' of the crime, as . . . an error of 'omission,'" and that no one claimed it to be structural error (*id.* at 6), the Court held in a per curiam opinion that

the *Brecht/Kotteakos* standard must be applied. *Id.* at 7. In this case, too, one could with equal justification characterize the error as the misdescription or omission of an element—the contemporaneity element of aiding and abetting felony murder. Substantively no more serious than the one in *Roy*, the error here, too, required standard harmless error review.

b. *Sullivan* v. *Louisiana*, 508 U.S. at 280, found an instructional error to be structural. This Court in *Neder*, 527 U.S. 1, distinguished *Sullivan* and found a different instructional error to be trial error only. *Neder* explains why the error here was not comparable to the one in *Sullivan* and was indistinguishable from the one in *Neder*.

Sullivan, 508 U.S. at 280, held that a defective reasonable doubt instruction was structural error because it produced no jury verdict of guilty beyond a reasonable doubt and, likewise, made "utterly meaningless" the harmless error inquiry into "whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error. . . ." Put another way, the error left a reviewing court with "no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* The error "vitiate[d] *all* the jury's findings." *Id.* at 281. Its "precise effects [were] unmeasurable," *id.*, its "consequences . . . necessarily unquantifiable and indeterminate. . . ." *Id.* at 282.

In *Neder*, 527 U.S. at 8, the trial court erred by failing to instruct the jury on the materiality element of perjury. Finding only trial error, *Neder* distinguished *Sullivan* because the error in *Neder* "did not 'vitiat[e] all the jury's findings'. . . ." even though it "prevent[ed] the jury from making a finding on the element of materiality." *Neder*, at 11. Here, as petitioner has conceded, there is a reasonable likelihood that the jury did not find the contemporaneity element of aiding and abetting felony murder. But the jury reached its verdict by finding the defendant guilty beyond

a reasonable doubt, and the error did not prevent the jury from making other findings beyond a reasonable doubt. Accordingly, the error here, like the one in *Neder*, did not vitiate all or, indeed, any of the jury's findings as the basis upon which a court could conduct harmless error review. As in *Neder*, and in contrast to *Sullivan*, there is an *object*—a jury verdict rendered on a proper reasonable doubt standard—upon which harmless error analysis can operate.

Neder recognized that one "strand of the reasoning in *Sullivan*" supported the argument that the omission of an element is structural error because it "prevents the jury from rendering a 'complete verdict' on every element of the offense." *Neder*, at 11. But *Neder* found that such reasoning "cannot be squared with our harmless-error cases." *Id.* Accord, *Washington* v. *Recuenco*, 125 S.Ct. at 2553. *Neder* noted that the misdescribed element in *Pope*, the conclusive presumption in *Carella*, and the omission or misdescription in *Roy* were all errors that could be said to have prevented the jury from producing a "complete verdict," yet none of those errors was structural. *Neder*, at 11-12. In this case, the reasonable likelihood that the jury failed to make the required finding of contemporaneity and, therefore, failed to return a "complete verdict" is likewise insufficient to make the error structural.

Neder went further. The defendant in that case argued that "a finding of harmless error may be made only upon a determination that the jury rested its verdict on evidence that its instructions allowed it to consider." *Id.* at 17. *Neder* rejected that argument, calling it "simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis." *Id.* The fact that the omitted-element error "preclude[d] any consideration of evidence relevant to the omitted element," *id.* at 17-18, did not prevent a prejudice analysis. It only mandated one that was not strictly limited

to the evidence the jury considered: would the jury have convicted absent the error? *Id.* at 18. *Neder* thus established that an instructional error does not become structural simply by preventing a jury from considering some evidence. Since the error in this case did not prevent the jury from considering *any* evidence, it could only be trial error.

c. This Court's post-*Neder* cases have confirmed that error such as the one here was only trial error. In *Washington* v. *Recuenco*, 126 S.Ct. 2546, the jury found that the defendant was armed with a deadly weapon at the time he committed the crime, but the jury was not instructed to determine whether the defendant was armed with a firearm. *Id.* at 2549. At sentencing, the trial court supplied the latter finding and imposed a longer sentence than what the defendant would have received had the court limited itself to what the jury found—that the defendant committed the offense while armed with a deadly weapon that was not necessarily a firearm. *Id.* The trial court thereby violated the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Recuenco*, at 2549.

Recuenco found the error to be indistinguishable from the one in *Neder*, and concluded, "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Id.* at 2552-53. Although the errors in both cases failed to produce "a complete finding of guilt of the crimes for which the defendant was sentenced," *id.* at 2552, such incompleteness did not make the error structural. *Id.* at 2553. See *Mitchell* v. *Esparza*, 540 U.S. at 15-17 (not contrary to Supreme Court precedent to conduct harmless error review of state's erroneous failure to charge factual circumstance necessary for imposition of death penalty).

If harmless error analysis was appropriate in *Recuenco* and *Esparza*, then it is necessarily appropriate here. In those cases, harmless error analysis was permissible even if the jury convicted the defendant of, in effect, only a lesser offense than the one for which he was sentenced. This case presents a firmer basis for conducting harmless error analysis because the jury convicted respondent of the charged offense, murder (even though a reasonable likelihood exists that the jury misapplied the law in doing so).

In summary, the error here was neither more serious than the trial errors in *Rose*, *Pope*, *Carella*, *Roy*, *Neder*, and *Recuenco* nor remotely comparable to the structural errors of an unconstitutional definition of "beyond a reasonable doubt" (as in *Sullivan*) or a true directed verdict. Accordingly, the Court's modern cases addressing instructional error demonstrate that the error here was trial error only.

2. The error here did not meet this Court's definition of structural error.

This Court's modern harmless error cases show that an instructional error is structural only when the finding of error itself demonstrates that the error has deprived a reviewing court of the ability to determine whether the error was prejudicial. An error deprives a reviewing court of the ability to determine prejudice only in the exceedingly rare case in which the error produces a record devoid of a verdict beyond a reasonable doubt or, as in a directed verdict, a record lacking a verdict based on relevant evidence. Since the likely misapplication of law that was the error in this case did not deprive a reviewing court of the requisite record upon which harmless error analysis may be conducted, the error was not structural.

Contrary to the view of the Ninth Circuit panel, structural instructional error must be more serious than

trial error that proves to be prejudicial. See *Neder*, 527 U.S. at 13-14 (argument that instructional error is structural unless jury found facts functionally equivalent to the omitted element improperly "imports into the initial structural-error determination . . . a case-by-case approach that is more consistent with our traditional harmless-error inquiry (i.e., whether an error is harmless)."). Instead of prejudicial trial error, structural instructional error is error that is recognizable as structural because it "def[ies] analysis by 'harmless error' standards." *Arizona* v. *Fulminante*, 499 U.S. at 309; *Neder*, 527 U.S. at 7. See *Sullivan* v. *Louisiana*, 508 U.S. at 280 (structural error is error with consequences that are necessarily unquantifiable and indeterminate); *id.* at 281 (because it vitiates *all* the jury's findings, an erroneous definition of "beyond a reasonable doubt" allows reviewing court only to speculate what a reasonable jury would have done). In other words, an error is structural only when the determination that constitutional error occurred itself establishes that harmless error analysis cannot even begin.

United States v. *Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006), demonstrates how a reviewing court's determination of error includes the basis for an assessment of whether the error was structural. The defendant in *Gonzalez-Lopez* was deprived of his constitutional right to counsel of choice. *Id.* at 2563. The Court held that the error met the definition of structural error from *Sullivan*, 508 U.S. at 282: an error "with consequences that are necessarily unquantifiable and indeterminate. . . ." *Gonzalez-Lopez*, at 2564. The Court explained, "It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.* at 2565. The Court did not, because it could not, actually assess the impact of the error on the trial. *Id.* at 2564 n.4. Rather, it recognized from a

statement of the error itself that a court could not even begin to make such an assessment.

The constitutional error at issue in this case occurred because of the reasonable likelihood that the jury convicted respondent of felony murder under an aiding and abetting theory without making the required finding that respondent aided and abetted the underlying felony of robbery before the killing. A statement of the error thus establishes that it did not produce a conviction based either on less than a beyond-a-reasonable-doubt standard of proof or on no relevant evidence. Likewise, the consequences of the error were not *necessarily* unquantifiable and indeterminate. For the same reason, the error allowed a reviewing court to conduct a prejudice analysis and was only trial error.

3. An error cannot become structural simply because it can be characterized as "alternative legal theory error."

Because the error here stemmed from instructions that provided the jury with an erroneous alternative theory on which to convict, it could fairly be called alternative-legal-theory error. But such a label has no legal significance. Characterizing the error as alternative-legal-theory error does not make it any more serious than "single legal theory error"—submitting to the jury a single theory of guilt tainted by unconstitutional instructional error.

By definition, alternative-legal-theory error allows the jury to convict on either an incorrect theory or a correct one, whereas single-legal-theory error allows the jury to convict with only an incorrect theory. Giving the jury a right way in addition to a wrong way to convict may be a less serious error than giving the jury only a wrong way. For example, if the trial court in *Neder* had instructed the jury that it could convict the defendant either by finding all the elements of the crime, including materiality, or by

finding all the elements except materiality, such an alternative-legal-theory error could not possibly have been more serious than the single-legal-theory error that actually occurred: the simple omission of the materiality element. Likewise, if the trial court in this case had instructed the jury only with the flawed aiding-and-abetting theory, as opposed to that theory and a correct direct perpetrator theory, the former approach—single-legal-theory error—could not have been more serious than the latter, alternative-legal-theory error. And, since single-legal-theory error is commonly and presumptively trial error, as it was in *Neder*, it follows that an error does not become structural simply because it can be characterized as alternative-legal-theory error. See *Quigley* v. *Vose*, 834 F.2d at 16 (per curiam) ("Once the camouflage is stripped away, petitioner's assertion reduces to the strange claim that, because the jury here received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than in *Rose*—where the *only* charge on the critical issue was a mistaken one. That assertion cannot possibly be right, so it is plainly wrong."); accord, *Becht* v. *United States*, 403 F.3d at 548, see also *United States* v. *Holly*, 483 F.3d 1298, 1304-07 (10th Cir. 2007) (alternative-legal-theory error subject to harmless error review).

In sum, calling an instructional error "alternative legal theory error" does nothing to rebut the strong presumption that the error could be harmless. *Rose*, 478 U.S. at 579. What matters is the substance of the error, not its label. See *Roy*, 519 U.S. at 5 (immaterial whether error called misdescription or omission of an element). As shown above, the error here was substantively indistinguishable from errors this Court has found to be trial errors; it was not comparable to errors this Court has found to be structural; and it did not meet the definition of structural error. It was trial error only.

B. *Stromberg* is inconsistent with the Court's modern harmless error cases.

Given this Court's modern harmless error jurisprudence, the Ninth Circuit's citation in this case to its *Lara* v. *Ryan* rule—a rule it derived from *Stromberg* v. *California*, 283 U.S. at 363—does not qualify as the "clearly established Federal law" that a federal habeas court must use to judge a state court decision under 28 U.S.C. § 2254(d).

In *Stromberg*, the trial court instructed the jury that it could convict by finding that the defendant displayed a red flag for any of three purposes. The first one was impermissible to criminalize because it included constitutionally protected conduct. *Id.* at 369. Because of "the manner in which the case was sent to the jury," including the prosecutor's argument to the jury that it "could convict the appellant under the first clause alone, without regard to the other clauses," this Court reversed, finding it "impossible to say under which clause of the statute the conviction was obtained. . . ." *Id.* at 368.

Stromberg cannot be reconciled with this Court's modern harmless error cases. According to *Stromberg*, reversal is required when two conditions exist: (1) one of several possible grounds for conviction is constitutionally impermissible and (2) the verdict "may have rested" on the impermissible ground. Under this Court's modern cases, those two conditions are no longer sufficient to require reversal. That is, a jury's possible reliance on a legally impermissible theory is no more than constitutional *error*, requiring no relief if a reviewing court determines that the jury would have reached the same verdict under proper instructions. Only structural error is exempt from the latter principle. But, as shown previously, "alternative legal theory error" is not necessarily structural.

1. The concept of prejudice from constitutional instructional error has fundamentally changed from any concept of prejudice that might be attributed to *Stromberg*.

After *Stromberg*, this Court relied on that case to reverse convictions in cases in which the jury might have relied on a constitutionally defective theory to convict. E.g., *Bachellar* v. *Maryland*, 397 U.S. 564, 570-71 (1970); *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942). This Court also relied on *Stromberg* in cases in which the jury might have relied on an erroneous legal principle the Court did not expressly find to be unconstitutional. E.g., *Yates* v. *United States*, 354 U.S. 298, 312 (1957). See *Bollenbach* v. *United States*, 326 U.S. 607, 614-15 (1946) (not citing *Stromberg*; reversing conviction based on legally erroneous theory; citing right to jury trial as precluding supposition that Congress intended to allow appellate court to find guilt).

In holding that constitutional error could be harmless, however, this Court in *Chapman* v. *California*, 386 U.S. 18, necessarily changed the *Stromberg* rule. In *Rose* v. *Clark*, 478 U.S. at 572, 582, 584, the Court held for the first time that instructional error of constitutional dimensions could be found harmless under *Chapman*. However, *Rose* did not clearly state how a *Chapman* analysis would differ from a reviewing court's previous focus on whether the jury *could* have relied on the erroneous instruction. See *id.* at 582 n.11 (formulating the harmless error question as "what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?"). In *Neder*, if not before, the prejudice test crystallized into what a properly instructed jury *would* have done: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18.

See *Sullivan*, 508 U.S. at 280 (referring to the harmless error inquiry as "whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error. . . .").

Thus, from the time of *Stromberg* to the modern harmless error era, the prejudice question evolved from what the jury *could* have done *with* the erroneous instruction to what the jury *would* have done *without* it. The *Stromberg* rule is inconsistent if not irreconcilable with the Court's modern harmless error cases because *Stromberg* requires reversal without regard to what the jury would have done had it been properly instructed.

The modern distinction between structural and trial error further demonstrates the demise of *Stromberg*. At the time of *Stromberg*, that distinction did not exist, either nominally or functionally. *All* federal constitutional instructional errors were treated as structural because a reviewing court never asked, as modern courts do, whether the result would have been the same absent the error. Reviewing courts reversed under *Stromberg* by finding something less than modern instructional error: a mere possibility, as opposed to a "reasonable likelihood," that the jury misapplied the law by relying on the erroneous aspect of the challenged instruction. Thus, *Stromberg* is also inconsistent with the modern rule that in most cases—indeed, the overwhelming majority—an instructional error requires no relief if the jury would still have convicted had the error not occurred. Likewise, the California Supreme Court did not violate "clearly established" law by applying the modern rule, rather than *Stromberg*.

2. This Court has never indicated that *Stromberg* can be reconciled with the Court's modern harmless error rules, and *Pope* v. *Illinois* shows that it cannot be.

a. After first holding in *Rose* that constitutional instructional error can be harmless, the Court has rarely referred to *Stromberg*'s rule of alternative-legal-theory error. None of those references validates *Stromberg*'s notion that a conviction must be reversed if a jury may have used a constitutionally erroneous legal theory to reach it.

Mills v. *Maryland*, 486 U.S. 367, 375 (1988), considered how the jury in the penalty phase of a capital trial interpreted its instructions and verdict form. The defendant argued that the jury adopted an unconstitutional interpretation: that the jury could not consider mitigating evidence before first unanimously agreeing that the evidence constituted a mitigating circumstance. *Id.* at 375, 376. Citing *Stromberg*'s rule of alternative-legal-theory error and other authority, *Mills* formulated the issue this way: "Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing. [Footnote omitted.]" *Id.* at 377. *Mills* proceeded to explain: "[W]e cannot conclude, with any degree of certainty, that the jury did not adopt petitioner's interpretation of the instructions and verdict form." *Id.* at 377-78. *Mills* invoked the *Stromberg* rule that alternative-legal-theory error requires reversal if a reviewing court cannot know whether the jury relied on a legally impermissible theory.

But *Mills* is inapposite because it used the alternate-legal-theory rule in a different context from the one in which *Stromberg* used it. Whereas *Stromberg* focused on whether to reverse a conviction if the jury might have misapplied the law, *Mills* used the *Stromberg* rule to decide whether the jury *had* misapplied the law—not what to do

if it had. Although *Mills* found that the error required resentencing, *id.* at 385, it did not explain why. Nor did it address *Rose* or *Pope*. Instead, *Mills* used *Stromberg*'s "prejudice" standard to define instructional error without considering prejudice itself. Accordingly, *Mills* is best interpreted as using *Stromberg* to establish the degree to which a reviewing court must be satisfied that a jury misinterpreted an instruction before the court may conclude that unconstitutional instructional error occurred.

An analysis of *Boyde* v. *California*, 494 U.S. 370, solidifies this understanding of *Mills*'s use of *Stromberg*. *Boyde* observed that the instruction at issue in that case differed from the one in *Stromberg* in that the *Stromberg* instruction was "concededly erroneous" and gave rise to the "likely possibilit[y]" that the jury relied on it to convict. *Boyde*, 494 U.S. at 380. *Boyde* then explained that *Stromberg* was not inconsistent with a rule that the "reasonable likelihood" test is the "proper inquiry" when "the instruction is ambiguous and therefore subject to an erroneous interpretation." *Id.* Accordingly, *Boyde* suggested that the "reasonable likelihood" test is satisfied when a "concededly erroneous" instruction creates a "likely possibilit[y]" that the jury misapplied the law. *Boyde* thereby confined *Stromberg* to the realm of error, as opposed to prejudice, even more clearly than *Mills* did.

This Court next mentioned *Stromberg*'s rule of alternative-legal-theory error in *Griffin* v. *United States*, 502 U.S. 46 (1991), but again only to distinguish it. *Griffin* found the *Stromberg* rule inapplicable to a case in which a jury is given two factual theories on which to convict and only one of them is supported by substantial evidence. *Id.* at 56. Finally, the Court alluded to the *Stromberg* rule in *Sochor* v. *Florida*, 504 U.S. 527, 538 (1992), but only in reaffirming *Griffin* and thus implicitly finding *Stromberg* inapplicable yet again.

b. This Court has not only treated *Stromberg* as a rule

for determining the existence of error, rather than as a rule of reversal, but has never attempted to reconcile *Stromberg* with the *Rose* line of cases. The Court has not mentioned the *Stromberg* rule after *Neder* crystallized the prejudice test for instructional error as whether the jury would have convicted had it been properly instructed.

Pope v. *Illinois*, 481 U.S. 497, demonstrates most clearly the incompatibility of *Stromberg* with modern instructional error cases. In *Stromberg* the jury could have relied on an instructional theory permitting conviction based upon the defendant's constitutionally protected speech. In *Pope* the jury indisputably *did* rely on such a theory. The jury was given only one legal theory on which to convict—a theory that defined pornography so broadly that it included constitutionally protected speech. *Id.* at 500-01. Yet *Pope*, without mentioning *Stromberg*, held that the error could be harmless. *Id.* at 502-03. If *Pope* is correct—and the Court's favorable references to it leave no doubt that it is, see, *e.g.*, *Neder*, 527 U.S. at 11-12, 13-14—*Stromberg* cannot be. At a minimum, *Stromberg* cannot be "clearly established" law trumping *Pope*.

3. The Ninth Circuit's variant on *Stromberg* is inconsistent with this Court's modern harmless error approach.

The Ninth Circuit's rule differs in its precise wording from the *Stromberg* rule, but the difference is insignificant, especially for purposes of AEDPA. Under *Stromberg*, alternative-legal-theory error requires reversal if a reviewing court finds it impossible to tell whether the jury relied on an unconstitutional or legally erroneous theory to convict. Under the Ninth Circuit's rule, alternative-legal-theory error requires reversal if a reviewing court cannot be "absolutely certain" that the jury did not rely on a legally incorrect theory. *Lara*, 455 F.3d at 1085. As can be seen simply from stating the two rules, the Ninth Circuit's

version is at least as stringent as *Stromberg*'s. As shown in the previous section, the *Stromberg* rule is inconsistent with this Court's modern harmless error rules because it is too stringent. Necessarily, then, the Ninth Circuit's rule is inconsistent with this Court's modern harmless error cases as well.

A review of the genesis of the Ninth Circuit's rule compels the same conclusion. The Ninth Circuit's "absolutely certain" variant of the *Stromberg* rule derives from the Ninth Circuit's reading of *Zant* v. *Stephens*, 462 U.S. 862 (1983), even though the term "absolutely certain" does not appear in *Zant*. See *Ficklin* v. *Hatcher*, 177 F.3d 1147, 1149-50 (9th Cir. 1999). *Zant* considered whether the defendant's death-penalty judgment had to be vacated because the state supreme court subsequently invalidated one of three statutory aggravating circumstances found by the jury. *Zant*, at 864. Considering the *Stromberg* line of cases, *Zant* noted that reversal was required in those cases if the record "left the reviewing court *uncertain* as to the actual ground on which the jury's decision rested," *id.* at 881 (emphasis added), or if the verdict may have rested on constitutionally protected conduct. *Id.* at 883. Neither circumstance applied in *Zant* because the jury did not rely entirely on the invalid aggravating factor, *id.* at 881, and none of the aggravating circumstances involved constitutionally protected conduct. *Id.* at 884.

Ficklin upheld a conviction despite an instruction on an impermissible legal theory because the court could "tell *with certainty* from the jury instructions that the jury rested its verdict on a ground that did not implicate petitioner's constitutional right. . . ." *Ficklin*, 177 F.3d at 1151 (emphasis added). Having thus expanded *Zant*'s colloquial use of the word "uncertain," the Ninth Circuit proceeded to expand it further. *Keating* v. *Hood*, 191 F.3d at 1063, turned *Ficklin*'s "with certainty" into "absolutely certain," and *Lara* v. *Ryan*, 455 F.3d at 1085, repeated that

language.

Apart from its dubious paraphrasing of *Zant*, the Ninth Circuit incorrectly interpreted *Zant* as suggesting a modification of the *Stromberg* rule. *Zant* held merely that the *Stromberg* rule does not apply when a jury has not relied entirely on an invalid theory. Even if *Zant* could be said to have rested on *Stromberg*, it still would remain unclear how a pre-*Rose* case such as *Zant* is any better authority for the post-*Rose* survival of *Stromberg* than *Stromberg* itself.

In *Lara*, 455 F.3d at 1086, the Ninth Circuit attempted to reconcile its *Stromberg*-based rule with the *Rose* line of cases. But it did so only in conclusory fashion:

> . . . the trial court did not merely omit or misstate an element of the charged offense. Rather, its error was structural, because it enabled the jury to deliver a general verdict that potentially rested on different *theories of guilt*, at least one of which was constitutionally invalid. *See Sandstrom*, 442 U.S. at 526. . . . As such, Lara's claim arises from the "very limited class of cases" in which a structural error has occurred. *Neder*, 527 U.S. at 8. . . .

Instead of explaining why alternative-legal-theory error is structural, *Lara* simply asserted that it is. But as explained previously, an instructional error does not become structural simply because one can call it "alternative legal theory error." When the substance of the error is no more serious than the presumed elements in *Rose* or *Carella*, the misdescribed elements in *Pope* or *Roy*, or the omitted elements in *Neder*, *Recuenco*, or *Esparza*, the error can be trial error only.

Even if mere Circuit authority could amount to "clearly established Federal law" under AEDPA—and it cannot, see *Carey* v. *Musladin*, 549 U.S. 70, 127 S.Ct. 649, 653-54 (2006)—the Ninth Circuit's variant on the *Stromberg* rule suffers from the same infirmities as the *Stromberg* rule

itself.

4. Because alternative-legal-theory error is an unbounded principle, the Ninth Circuit's *Stromberg*-based rule subverts this Court's modern harmless error principles.

The same quality that makes alternative-legal-theory error ordinarily indistinguishable from other types of instructional trial error makes the Ninth Circuit's *Stromberg*-based rule very dangerous. That rule would render incoherent this Court's doctrinal definitions and would create a template for making structural error out of what is only trial error.

Under this Court's jurisprudence, instructional error requires a reasonable likelihood that the jury misapplied the law, and structural error cannot be harmless. Under the Ninth Circuit's *Stromberg*-based rule, one form of structural error (alternative-legal-theory error) *can* be harmless but only when, in effect, no instructional error occurred in the first place. That is, alternative-legal-theory error in the Ninth Circuit does not require reversal if a reviewing court is absolutely certain that the jury did not rely on the erroneous theory to convict. But, if the jury did not rely on the erroneous theory, the jury did not misapply the law. And if the jury did not misapply the law, there is no constitutional error at all, given the *Boyde/McGuire* definition of error. Therefore, in the Ninth Circuit, alternative-legal-theory error is structural error that not only can be harmless but may not even be error. It would be difficult to confuse this Court's harmless error rules more thoroughly.

Apart from the doctrinal anarchy it creates, the Ninth Circuit's rule is a prescription for reversing convictions in all manner of instructional errors. Many if not most crimes are defined with alternative legal theories. Under the Ninth Circuit's rule, any error in the instructions on one

theory can be portrayed as alternative-legal-theory error and, as such, structural. As demonstrated by *Lara*, *Keating*, *Ficklin*, and this case, alternative-legal-theory error is a recurring phenomenon in the Ninth Circuit. See also *Martinez* v. *Garcia*, 379 F.3d 1034, 1040-41 (9th Cir. 2004); *Suniga* v. *Bunnell*, 998 F.2d 664 (9th Cir. 1993).

Just as it would greatly increase the number of structural errors, the Ninth Circuit's invocation of its *Stromberg*-based rule in 28 U.S.C. § 2254 cases undermines this Court's command in *Fry* v. *Pliler* that federal habeas courts normally must apply the *Brecht* harmless error test to constitutional violations. Since many instructional errors can easily be portrayed as alternative-legal-theory error—and therefore structural under the Ninth Circuit's approach—the Ninth Circuit's rule jettisons *Brecht*'s deferential review of state court findings of harmless instructional error and replaces it with (1) an unguided de novo determination of whether an instruction can be characterized as alternative-legal-theory error and, if such a finding is made, (2) a "structural error" determination of whether the jury could have relied on the assertedly erroneous instruction.

The Ninth Circuit's rule is equally damaging to AEDPA's requirement of deferential review of state court adjudications of federal claims. AEDPA requires habeas courts to affirm state convictions unless the state court acted contrary to or unreasonably applied clearly established Supreme Court precedent. If the Ninth Circuit rule were to survive, *Stromberg*, not *Chapman*, could be deemed clearly established Supreme Court precedent whenever an error can be called alternative-legal-theory error. Thus, state courts would face a difficult choice when adjudicating such claims on direct review. If the state court follows the Ninth Circuit's rule, it will have to reverse unless it finds, in effect, no error—i.e., no jury reliance on the improper alternative theory. If the state court does not

follow the Ninth Circuit's rule and applies only *Chapman*, it will act contrary to what the Ninth Circuit considers to be the clearly established rule: the perceived mandate of *Stromberg* that alternative-legal-theory error is structural. At that point, the state court adjudication will lose AEDPA's deferential review in federal court. By classifying alternative-legal-theory error as structural error, the Ninth Circuit's rule may force state courts either to forgo *Chapman* analysis on direct appeal or forfeit AEDPA deference if they do not. Lacking any principled limits or doctrinal coherence, the Ninth Circuit's rule of alternative-legal-theory error threatens to undo both this Court's harmless error work from the last twenty years and the deferential review federal habeas courts are required to accord state court judgments by AEDPA and *Brecht* v. *Abrahamson*.

* * * * * * * * *

Because the error here was trial error only, the California Supreme Court did not act contrary to this Court's clearly established precedent in testing it for prejudice. The case must be remanded to the Ninth Circuit for application of the *Brecht* harmless error test: whether the error had a substantial and injurious effect on the verdict.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: May 8, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

MANUEL MEDEIROS
State Solicitor General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JF:er
SF2007402455
40251498.wpd

RESPONDENT'S BRIEF

180

(8)

No. 07-544

FILED
JUL 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CHRIS CHRONES, Warden,

Petitioner,

v.

MICHAEL PULIDO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

J. BRADLEY O'CONNELL*
Assistant Director
FIRST DISTRICT APPELLATE PROJECT
730 Harrison Street, Suite 201
San Francisco, California 94107
Telephone: (415) 495-3119
Fax: (415) 495-0166
E-mail: jboc@fdap.org
Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

06-9229 67

QUESTION PRESENTED

Under *Stromberg v. California*, 283 U.S. 359 (1931), and numerous subsequent opinions, submission of a legally unauthorized theory of liability requires reversal where the reviewing court cannot be certain whether the jury's general verdict rests upon the unconstitutional theory or on a legally valid alternative theory. This case concerns the relationship between the *Stromberg* rule and harmless error analysis:

> Where a habeas court is unable to determine whether a verdict rests upon a legally unauthorized, but factually supported, theory or on a legally valid, but factually contested, alternative theory, does that uncertainty necessarily represent a "grave doubt" as to the error's effect, which entitles the defendant to habeas relief under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O'Neal v. McAnnich*, 513 U.S. 432 (1995)?

TABLE OF CONTENTS

Page

Table of Authorities vi

Constitutional Provisions 1

Statement of the Case 1

A. The State Trial 1

1. Trial evidence 1

2. Instructions and argument 2

3. The jurors' queries and verdicts 5

B. The State Appeal 7

C. Federal Habeas Proceedings 8

Summary of Argument 14

Argument 18

I. *Stromberg v. California* Is Fully Consistent with Contemporary Harmless Error Analysis. Where a Reviewing Court Cannot Determine Whether the Jurors Relied upon a Legally Unauthorized Theory or on a Valid Alternative Ground, That Uncertainty Represents Both a "Reasonable Doubt" and a "Grave Doubt" as to the Error's Effect on the Verdict 18

A. The Conceded Constitutional Error 18

B. The *Stromberg* Rule Requires Reversal Where the Reviewing Court Cannot Determine Whether a General Verdict Rests on an Unconstitutional Theory or on a Valid Alternative Ground 21

TABLE OF CONTENTS – Continued

Page

C. Harmless Error Analysis Does Not Permit a Reviewing Court to Substitute Itself for the Jury. Under *Neder*, the Removal of an Element from the Jury Cannot Be Harmless Where the Evidence on That Element Was in Conflict 25

1. Standards of prejudice 25

2. Scope of harmless error review of instructional error 26

D. Like *Neder*, the *Apprendi* Line of Cases Reflects the Court's Refusal to Allow Judges to Supplant Jurors in Making Crucial Factual Determinations 30

E. The *Stromberg* Rule Is Consistent with the Court's Harmless Error Jurisprudence 32

F. Where a Court's *Stromberg* Review of the Record Does Not Disclose the Actual Basis of the Jurors' Verdict, That Uncertainty Necessarily Represents Both a "Reasonable Doubt" (*Chapman*) and a "Grave Doubt" (*Brecht-O'Neal*) as to the Error's Effect on the Verdict 35

TABLE OF CONTENTS – Continued

Page

II. This Court's Application of a *Stromberg*-like Standard to Submission of Unauthorized Theories of Liability in *Civil* Trials Further Demonstrates Its Consistency with the *Kotteakos-Brecht* Standard. Any Abandonment of *Stromberg* Would Have Grave Consequences for Civil, as Well as Criminal, Appellate Practice 41

1. Consistency with *Kotteakos* 43

2. Civil consequences of any abandonment of *Stromberg* 45

III. Under *Fry v. Pliler*, the *Brecht* Standard Governs Habeas Review of Harmless Error, and No Separate § 2254(d)(1) Review Is Necessary 47

A. *Brecht* Subsumes AEDPA Review of Harmlessness and Renders Any Separate § 2254(d)(1) Inquiry Unnecessary... 47

B. The State Court Unreasonably Failed to Consider the Complete Jury Instructions, the Jurors' Queries, and the Conflicting Evidence 48

IV. This Court Should Affirm the Disposition Because, Although the Ninth Circuit Labeled Its Review Differently, Its Actual Substantive Determinations Correspond to a Finding of Prejudice Under the *Brecht* Standard..... 51

TABLE OF CONTENTS – Continued

Page

V. If the Court Concludes That the Ninth Circuit's Findings Are Not Equivalent to a *Brecht* Prejudice Determination, Then This Court Should Remand the Matter to the Circuit to Conduct a *Brecht* Inquiry in the First Instance 53

Conclusion 55

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000)....30, 31, 32

Arizona v. Fulminante, 499 U.S. 279 (1991) 25

Bachellar v. Maryland, 397 U.S. 564 (1970) 22

Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999).....40

Blakely v. Washington, 542 U.S. 296 (2004).....31, 32

Bollenbach v. United States, 326 U.S. 607 (1946).....37

Boyde v. California, 494 U.S. 370 (1990).....20, 22, 49

Brecht v. Abrahamson, 507 U.S. 619 (1993).....*passim*

Burks v. United States, 437 U.S. 1 (1978) 22

Calderon v. Coleman, 525 U.S. 141 (1998).....55

California v. Roy, 519 U.S. 2 (1996).....27, 55

Campos v. Bravo, 141 N.M. 801, 161 P.3d 846 (2007).....39

Carella v. California, 491 U.S. 263 (1989).....24, 26

Chapman v. California, 386 U.S. 18 (1967) .....*passim*

Chiarella v. United States, 445 U.S. 222 (1980).....22

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991).....42

City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).....42, 43, 45

TABLE OF AUTHORITIES – Continued

Page

Clay v. United States, 403 U.S. 698 (1971).....22

Cramer v. United States, 325 U.S. 1 (1945).....22

Crespin v. People, 721 P.2d 688 (Colo. 1986) 39

Cunningham v. California, 549 U.S. 270 (2007).....31

Delaware v. Van Arsdall, 475 U.S. 673 (1986).....55

Estelle v. McGuire, 502 U.S. 62 (1991) 20

Fiore v. White, 531 U.S. 225 (2001).....19

Fry v. Pliler, 551 U.S. ___, 127 S.Ct. 2321 (2007).....15, 47, 48, 50

Griffin v. United States, 502 U.S. 46 (1991).....*passim*

In re Winship, 397 U.S. 358 (1970) 19

Jenkins v. Georgia, 418 U.S. 153 (1974).....22

Jones v. United States, 526 U.S. 227 (1999).....31

Kotteakos v. United States, 328 U.S. 750 (1946)....*passim*

LaFevers v. Gibson, 182 F.3d 705 (10th Cir. 1999).....36

Laird v. Horn, 414 F.3d 419 (3rd Cir. 2005) 40

Lara v. Ryan, 455 F.3d 1080 (9th Cir. 2006).....13, 35

Leary v. United States, 395 U.S. 6 (1969).....22, 23

Martinez v. Garcia, 379 F.3d 1034 (9th Cir. 2004).....13

Maryland v. Baldwin, 112 U.S. 490 (1884) 42

Mathews v. United States, 485 U.S. 58 (1988).....30

TABLE OF AUTHORITIES – Continued

Page

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) 44, 45

Memphis Community School District v. Stachura, 477 U.S. 299 (1986).....43, 44

Miller-El v. Dretke, 545 U.S. 231 (2005).....50

Mills v. Maryland, 486 U.S. 367 (1988).....22, 24, 39

Neder v. United States, 527 U.S. 1 (1999) .....*passim*

O'Neal v. McAnnich, 513 U.S. 432 (1995).....*passim*

Olden v. Kentucky, 488 U.S. 227 (1988).....37

Parker v. Secretary for Department of Corrections, 331 F.3d 764 (11th Cir. 2003).....38

Penry v. Johnson, 532 U.S. 782 (2001) 49

People v. Guiton, 4 Cal. 4th 1116, 847 P.2d 45, 17 Cal.Rptr.2d 365 (1993).....48

People v. Martinez, 83 N.Y.2d 26, 628 N.E.2d 1320, 607 N.Y.S.2d 610 (1993).....36

People v. Pulido, 15 Cal. 4th 713, 936 P.2d 1235, 63 Cal.Rptr.2d 625 (1997).....7

People v. Sanchez 86 Cal. App. 4th 970, 103 Cal.Rptr.2d 809 (2001).....38

Pierce v. United States, 314 U.S. 306 (1941) 22

Pope v. Illinois, 481 U.S. 497 (1987).....24, 27, 54

Pulido v. Chrones, 487 F.3d 669 (9th Cir. 2007).....12

Pulido v. Lamarque, 2005 WL 6142229 (N.D. Cal. 2005) 8

TABLE OF AUTHORITIES – Continued

Page

Ring v. Arizona, 536 U.S. 584 (2002).....31

Rompilla v. Beard, 545 U.S. 374 (2005) 50

Rose v. Clark, 478 U.S. 570 (1986).....*passim*

Sansone v. United States, 380 U.S. 343 (1965).....30

Shafer v. South Carolina, 532 U.S. 36 (2001) 37

Simmons v. South Carolina, 512 U.S. 154 (1994).....37

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).....42

Stevenson v. United States, 162 U.S. 313 (1896).....30

Stirone v. United States, 361 U.S. 212 (1960) 22

Street v. New York, 394 U.S. 576 (1969) 22

Stromberg v. California, 283 U.S. 359 (1931)....*passim*

Sullivan v. Louisiana, 508 U.S. 275 (1993).....27, 28

Suniga v. Bunnell, 998 F.2d 664 (9th Cir. 1993) 13

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962).....42, 45, 46

Terminello v. City of Chicago, 337 U.S. 1 (1949).....22

Thomas v. Collins, 323 U.S. 516 (1945).....22

Tipton v. Socony Mobil Oil Corp., 375 U.S. 34 (1963).....44, 45

United New York & New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613 (1959).....42, 45, 46

United States v. Booker, 543 U.S. 220 (2005).....31

TABLE OF AUTHORITIES – Continued

Page

United States v. Edwards, 303 F.3d 606 (5th Cir. 2002) 36

United States v. Ellyson, 326 F.3d 522 (4th Cir. 2003) 38

United States v. Gaudin, 515 U.S. 506 (1995) 19, 20

United States v. Hastings, 134 F.3d 235 (4th Cir. 1998) 39

United States v. Holly, 488 F.3d 1298 (10th Cir. 2007) 36, 38

Washington v. Recuenco, 548 U.S. 212 (2006) 27, 55

Wiggins v. Smith, 539 U.S. 510 (2003) 50

Williams v. North Carolina, 317 U.S. 287 (1942) 22

Williams v. Taylor, 529 U.S. 362 (2000) 50

Yates v. Evatt, 500 U.S. 391 (1991) 24, 27

Yates v. United States, 354 U.S. 298 (1957) 22, 24

Zant v. Stephens, 462 U.S. 862 (1983) 23, 35, 39

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amend. I 22

U.S. Constitution, Amend. V 22, 24

U.S. Constitution, Amend. VI 1

U.S. Constitution, Amend. VIII 22

U.S. Constitution, Amend. XIV, § 1 ..... 1, 19

U.S. Constitution, Article IV, § 1 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES

California Penal Code

§ 189 1

§ 190.2(a) 1

§ 190.5 1

§ 211 1

§ 1203.075 ..... 1, 6

§ 12022.5(a) 1, 6

United States Code

Title 28

§ 2111 (formerly § 391) 44

§ 2254 8

§ 2254(d)(1) ..... *passim*

Title 42

§ 1983 ..... 42, 43

COURT RULES

Supreme Court Rule 24.2 2

BRIEFS AND PETITIONS

United States Supreme Court

Brief for Petitioner, *Waddington v. Sarausad*, No. 07-772 [2008 WL 2219954] 20

TABLE OF AUTHORITIES – Continued

Page

Brief of Amicus Curiae American Association of Railroads, *Pacific Railroad Co. v. Barber*, No. 04-47 [2004 WL 2070874] 46

Petition for Writ of Certiorari, *Advanta Corp. v. Riseman*, No. 02-882 [2002 WL 32133789], cert. den., 537 U.S. 1190 (2003).....46

Petition for Writ of Certiorari, *Mitsubishi Electric Corp. v. Ampex Corp.*, No. 99-1287 [2000 WL 34014313], cert. den., 529 U.S. 1054 (2000).....46

Petition for Writ of Certiorari, *Union Pacific Railroad Co. v. Barber*, No. 04-47 [2004 WL 1559799], cert. den., 543 U.S. 940 (2004) 46

United States Court of Appeals for the Ninth Circuit

Appellant's Opening Brief, *Pulido v. Lamarque*, 9th Cir. No. 05-15916 [2005 WL 3128204] 8, 20

RESPONDENT'S BRIEF ON THE MERITS

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment, § 1, provides, in pertinent part: ". . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. The State Trial

1. Trial evidence. Michael Pulido was tried on charges of first-degree murder, Cal. Pen. Code § 189, and robbery, *id.* § 211, as well as a robbery felony-murder "special circumstance," *id.* § 190.2(a)(17)(A),[1] and sentence-enhancing allegations of personal use of a firearm and personal infliction of great bodily injury, *id.* §§ 12022.5(a), 1203.075. The charges arose out of a robbery and fatal shooting of a clerk at a gas station/convenience store.

---

[1] In California, a "special circumstance" finding authorizes either capital punishment or a sentence of life without possibility of parole (LWOP). Cal. Pen. Code § 190.2(a); cf. *id.* § 190.5 (authorizing LWOP for defendant under age 18).

Like petitioner, PBM 2-5,[2] Pulido accepts the California Supreme Court's summary of the trial evidence, Pet.App. 102a-105a, which both the district and circuit courts also adopted, Pet.App. 34a-37a, 2a-5a. Consequently, Pulido will forego a full summary of that evidence here, Supreme Court Rule 24.2, and will provide only a very brief distillation of the most salient facts bearing on the "late joiner" theory at issue here.

Michael Pulido was 16 at the time of the homicide. Pet.App. 32a; RT 308. The prosecution tried this case principally on the theory that Pulido alone committed the robbery and shot the attendant. Pulido's principal accuser was his uncle Michael Aragon,[3] who reported that Pulido made a number of

---

[2] References are as follows: Appendix to the Petition for Writ of Certiorari ("Pet.App."); Joint Appendix ("JA"); Reporter's Transcript ("RT"); Petitioner's Brief on Merits ("PBM"); Amicus Curiae Brief of Solicitor General ("SG"); Amicus Curiae Brief of Criminal Justice Legal Foundation ("CJLF").

[3] Pulido had been staying with his uncle for several weeks while Pulido's guardian, his grandmother, was traveling out of the state. RT 424-426, 718-722, 695-696. Pulido's own father had left when Pulido was a child, and Aragon was like a father or an older brother to him. RT 972, 1466-1467. A child/adolescent psychiatrist testified that Aragon was one of the most important people in Pulido's life, and Pulido would lie to protect him. Pet.App. 76a; RT 1468-1469, 1474, 1477.

Aragon had prior convictions of burglary, cocaine possession, and contributing to the delinquency of a minor, and was on probation. Pet.App. 103a. Aragon's sister described him as a liar, a thief, and a manipulator. Pet.App. 76a; RT 881.

incriminating statements about robbing the station. Pulido however, testified that it was *Aragon* who robbed and shot the attendant. Pulido had been riding with Aragon and remained in the car when Aragon went into the store. Pulido had no foreknowledge of his uncle's plans and rushed into the store when he heard the shot. Pulido only reluctantly assisted Aragon during his flight *after* the killing, by prying open the stolen cash register and then disposing of the register in some roadside bushes. Pet.App. 104a; see RT 934-942, 976-977, 1009-1025, 1322.[4]

2. Instructions and argument. The murder charge went to the jury on three alternative theories: (a) that Pulido personally shot the victim; (b) that Pulido aided and abetted in the robbery prior to or during the principal perpetrator's shooting of the victim; or (c) that Pulido aided in the robbery only after the shooting by assisting in the asportation of the stolen goods during the flight from the scene (the "late joiner" theory).

---

[4] Either the next morning or the following day, Aragon showed up at his sister's house. His shirt was torn, he was glassy-eyed, and (according to the sister's son) he smelled of crack cocaine and appeared "antsy" and "paranoid." Pet.App. 105a; RT 871-873, 884-885.

Aragon later told the police he had been at home with his girlfriend Laura Moore and their infant the night of the crime. He initially said that they had awoken at 12:15 am to feed the baby, but in a later interview he moved the time to 3:00 am, Pet.App. 105a; RT 911, much closer to the apparent hour of the murder (approximately 3:45 am), Pet.App. 102a.

The "late joiner" theory was conveyed through multiple instructions. California's then-extant pattern instructions ("CALJIC") defined any killing during a robbery as felony-murder and imposed liability on any aider/abettor in the robbery, JA 10-11. For purposes of aider/abettor liability, the instructions stated that a robbery "continues so long as the stolen property is being carried away to a place of temporary safety." JA 21. A special instruction added: "For purposes of determining whether the defendant is guilty of robbery felony murder[,] the robbery continues until the robber has reached a position of temporary safety, with or without the stolen property." JA 23.

The prosecutor argued to the jury that Pulido alone committed the robbery and murder and that "Michael Aragon had nothing to do with this murder." RT 1731; see Pet.App. 79a; RT 1669-1671, 1679-1681, 1718. The prosecutor touched only passingly on aiding/abetting, stating that those instructions were given "just in case," but that it would be a "stretch . . . to believe the defendant is guilty not as the shooter but as an aider and abettor." RT 1660-1661. Though he continued to deride Pulido's testimony, the prosecutor also argued that, if believed, Pulido's account would support aider/abettor liability under the felony-murder instructions. "In other words[,] *you have to believe the defendant[']s story for this*. The defendant came up on the stand and gave you one more whopper and said, he wasn't the actual shooter. He was sitting out on top of the hood. *Again, the felony*

murder a place [sic] *the rule applies*." RT 1661, emphasis added.[5]

3. The jurors' queries and verdicts. Pulido's possible liability as an aider/abettor was evidently the primary focus of the jury's five days of deliberations. As detailed in the district court opinion, Pet.App. 59a-63a, the jurors submitted question after question concerning the scope of aider/abettor liability for felony-murder, including some which touched closely on the timing of any assistance which "facilitated" a robbery. JA 33-49. The judge confirmed that felony-murder liability attached to anyone who aided in the *robbery*, not merely to someone who aided in the murder. JA 48-49. However, the trial court was "unable to answer" the jury's question whether aiding/abetting required "'knowledge of unlawful purpose' . . . prior to . . . or during the commission of the crime." JA 41, 43.

In their most elaborate query, the jurors stated, "Felony homicide def[in]ition is unclear to us." The jurors submitted two diagrams reflecting "different interpretations" of the felony-murder aiding/abetting instruction and asked "which is correct?" JA 36-38.

---

[5] Though he gave an example of the "wheel man" in a bank robbery to illustrate the felony-murder rule, the prosecutor did not attempt to identify any way in which the evidence here indicated that Pulido somehow assisted his uncle *prior to the shooting*. Instead, the prosecutor returned to his primary theme that "I don't think [aiding/abetting] applies here," because Pulido acted alone. RT 1661-1662.

Diagram B contemplated murder liability for "Any" of three possible roles: "Actively commit robbery"; "Robbery intended"; or "Facilitate by aiding." JA 38 (full capitalization omitted).[6] As with the jurors' "before or during" query, JA 43, the trial court declined to answer the question directly and suggested that the jurors "reread" the relevant instructions, JA 39.

The jury ultimately returned verdicts convicting Pulido of murder and robbery and finding the "special circumstance" true. JA 55-57. However, the jurors deadlocked, either 8-4 or 4-8, on the firearm use and infliction of injury allegations. Pet.App. 33a.[7] Unlike the murder and robbery counts and the "special circumstance," those allegations required findings of *personal* firearm use and infliction of injury, rather than aiding and abetting, JA 27-30; see Cal. Pen. Code §§ 12022.5(a), 1203.075. The trial court sentenced Pulido to life imprisonment without possibility of parole.

---

[6] In contrast, Diagram A contemplated liability for "either" of two possible roles, the latter of which combined two of those listed in Diagram B: "Actively commit robbery"; or "Both robbery intended and facilitates by aiding." JA 37 (underlining in original; full capitalization omitted).

[7] As directed by the trial court, the jurors reported only that their division was 8-4, not which way that vote leaned. RT 2006-2007.

B. The State Appeal

On direct appeal, the California Supreme Court repudiated the "late joiner" theory and held that assistance in a robbery would not support felony-murder liability under state law if that assistance occurred only after the homicide. *People v. Pulido*, 15 Cal.4th 713, 719-726 [936 P.2d 1235, 63 Cal.Rptr.2d 625] (1997); Pet.App. 101a-120a; see 106a-115a. It found the jury instructions "defective" and misleading, Pet.App. 117a-119a & fn. 5, in authorizing felony-murder liability for "a person who aids and abets only in the asportation phase of robbery, after the killing is complete. . . . [T]hat implication would be incorrect." Pet.App. 118a-119a.

The state court declared the submission of that unauthorized theory harmless. The court quoted the introductory sentence of the special circumstance instructions which referred to a murder committed "while the defendant was engaged in or was an accomplice in" a robbery. Pet.App. 116a; see JA 12. The state supreme court construed the special circumstance verdict as proof that the jurors found "that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing." Pet.App. 116a.[8]

---

[8] As the Solicitor General notes, the state supreme court did not apply the *Chapman* "harmless beyond a reasonable doubt" test, *Chapman v. California*, 386 U.S. 18 (1967). SG 30; see Pet.App. 53a (district court decision). Instead, it relied on state

(Continued on following page)

C. Federal Habeas Proceedings

Pulido filed a pro se petition for a writ of habeas corpus, 28 U.S.C. § 2254. The state "tacitly conceded" that the submission of the unauthorized "late joiner" theory represented federal constitutional error[9] and defended the judgment solely on harmless error grounds.

The district court granted the writ in an extensive opinion. *Pulido v. Lamarque*, 2005 WL 6142229 (N.D. Cal. 2005) (unreported); Pet.App. 32a-97a. The district court conducted a two-stage harmless error analysis. First, it applied the AEDPA[10]/28 U.S.C. § 2254(d)(1) standard and found that the state court's harmless error declaration was both "contrary to" and an "unreasonable application" of the *Chapman* standard, which should have applied on direct appeal. Pet.App. 52a-65a. Second, the district court found that the instructional error had a "substantial and injurious effect or influence" under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet.App. 65a-67a.

The district court recognized a defect in the special circumstance instructions, which fatally undercut the state court's conclusion that the special

---

authorities allowing affirmance "if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory. [Citation.]" Pet.App. 117a.

[9] Appellant's Opening Br. at 52, *Pulido v. Lamarque*, 9th Cir. No. 05-15916 [2005 WL 3128204].

[10] Anti-Terrorism & Effective Death Penalty Act.

circumstance verdict cured the misinstruction on the underlying murder count. In the form submitted to Pulido's jurors, the special circumstance instructions did *not* require a finding of participation in the robbery contemporaneous with the killing. Both the oral and written versions of the substantive instruction stating the criteria for the robbery felony-murder special circumstance required such a verdict either: 1) if "the murder was committed while the defendant was engaged" in robbery or attempted robbery; "or" 2) if it "was committed in order to carry out or advance" the robbery "or to facilitate the escape therefrom or to avoid detection."[11] As the state has subsequently conceded, the instructions were defective in presenting these two requirements in the disjunctive ("or") – "a mistake the California Supreme Court had not detected." PBM 9 fn. 2.[12] The second of

---

[11] "To find that the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved:

> 1. The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery; **or**
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder." JA 14; RT 1643, emphasis added.

[12] The state court had quoted only the verdict form and the introductory sentence of the several pages of instructions on the special circumstance, Pet.App. 116a; JA 12, 56, and had not

(Continued on following page)

these alternatives authorized a special circumstance verdict without any finding that Pulido's own role in the robbery was contemporaneous with the killing. Consequently, contrary to the state court's assumption, the special circumstance verdict did not provide any assurance that the jurors found any pre-killing assistance in the robbery. Pet.App. 55a-57a.

The district court also reviewed the sequence of juror queries and responses by the trial court, especially the jurors' two diagrams positing alternative interpretations of felony-murder liability. JA 36-38. One of the options in Diagram B represented an unauthorized theory, based on merely "facilitat[ing]" a robbery which the defendant had not intended. Pet.App. 61a-63a; JA 38.[13] The trial court did not "remedy this misconception," but "simply referr[ed] the jurors back to the erroneous instruction." Pet.App. 62a-63a. Nor did it answer the jurors' "crucial question" whether an aider/abettor must have "'knowledge of the purpose' . . . prior to . . . or during the commission of the crime," though that query went "to the crux of" the underlying misinstruction on the timing requirement. Pet.App. 61a; JA 41, 43.

---

examined the substantive instruction stating the requirements for a verdict, JA 14.

[13] "[T]he jury's Diagram B . . . asks whether [Pulido] could be found guilty of felony murder if he only 'facilitate[d] by aiding.' Because the definition of aiding and abetting contained in the felony murder and robbery instructions omitted the crucial timing element, this prong would not represent a legally correct option." Pet.App. 62a.

Finally, because the evidence was in conflict whether Pulido had assisted in the robbery prior to the shooting, the omitted timing requirement was contested, rather than uncontroverted, under *Neder v. United States*, 527 U.S. 1, 19 (1999). Pet.App. 63a.

Together, the uncertainty as to the actual basis of the verdict, the conflicting evidence on the timing of Pulido's involvement, and the queries suggesting the jurors' focus on the invalid theory demonstrated that the misinstruction had a "substantial and injurious effect or influence" under the *Brecht* standard. Pet.App. 65a-67a.[14] The district court entered judgment granting relief on the instructional claim. Pet.App. 97a.[15]

---

[14] "Because the Court cannot be reasonably certain that the jury, if required to do so, would have found that [Pulido's] involvement in the robbery preceded the victim's death, the Court is left with 'grave doubt as to the likely effect of [the] error on the jury's verdict.'" Pet.App. 66a, citing *O'Neal v. McAnnich*, 513 U.S. 432, 435 (1995).

[15] The district court also considered and rejected several non-instructional habeas claims, including prosecutorial vouching for Aragon and a perjured testimony claim, based on a key prosecution witness' recantation. Pet.App. 67a-96a. At trial, Aragon's girlfriend Laura Moore had backed up Aragon's alibi that he was home with her and their baby at the time of the shooting. But, almost three years after trial, Moore contacted the lead police detective on her own initiative "to set the record straight." She averred that Aragon had left late that night, ostensibly to buy cigarettes, and had not yet returned by 2:00 am when she awoke to feed the baby. Pet.App. 71a-73a. The district court also noted additional evidence, not before the jury, probative of Aragon's involvement in the crime. Aragon had

(Continued on following page)

The Ninth Circuit affirmed that judgment in a per curiam opinion. *Pulido v. Chrones*, 487 F.3d 669 (9th Cir. 2007); Pet.App. 1a-24a. It held that the submission of the unauthorized "late joiner" theory required reversal, unless the court could be certain that the jurors actually relied upon a legally valid alternative ground. Like the district court, the circuit found that the special circumstance verdict did not provide any such assurance. The concededly-defective version of the special circumstance instructions did not require any finding that Pulido's own participation in the robbery was contemporaneous with the killing. Because the record did not establish that the jurors actually relied on a valid theory of contemporaneous aiding/abetting, that uncertainty required reversal of the murder conviction, under *Stromberg v. California*, 283 U.S. 359 (1931), and subsequent cases. Pet.App. 11a-12a.

The Ninth Circuit's *Stromberg* analysis relied on essentially the same case-specific circumstances as

---

failed a lie detector test. Pet.App. 76a. The trial court also had excluded evidence of a similar uncharged offense, in which Aragon "took a cash register" from a convenience store "by tearing the wires out of the wall, the same modus operandi used at [this] convenience store." Pet.App. 76a; see RT 66-73.

In upholding the district court's denial of relief on both the perjured testimony and prosecutorial vouching claims, the Ninth Circuit emphasized that the deadlock on the personal gun use allegation demonstrated that the jurors "must have rejected Aragon's testimony" and "apparently believed that Aragon was the shooter." Pet.App. 28a, 26a.

the district court's finding of prejudice under the *Brecht* standard. But, like several prior Ninth Circuit cases, the per curiam opinion characterized the submission of an unauthorized theory as a "structural" error, which could only be harmless where the record established that the jurors had actually relied on a proper ground. Pet.App. 11a.[16]

There were two separate concurring opinions. Though bound by the earlier Ninth Circuit cases, Judge O'Scannlain criticized the circuit's treatment of submission of invalid theories as structural and argued that it should be subject to harmless error review on the same terms as other misinstructions on elements. Pet.App. 12a-15a.

Judge Thomas defended the Ninth Circuit's application of the *Stromberg* rule to unauthorized alternative theories. Pet.App. 15a, 24a. But he also "wr[o]te separately to emphasize that the result the majority reaches would be the right result even under a harmless error standard." Pet.App. 15a. Like the district court, Judge Thomas observed that the "supposedly curative" special circumstance instruction "compound[ed] rather than alleviat[ed]" the risk that the jurors convicted "even while accepting Pulido's theory of after-the-fact assistance." The trial court

---

[16] Accord, e.g., *Lara v. Ryan*, 455 F.3d 1080, 1085-1087 (9th Cir. 2006); *Martinez v. Garcia*, 379 F.3d 1034, 1038-1041 (9th Cir. 2004), cert. den., 543 U.S. 1054 (2005); *Suniga v. Bunnell*, 998 F.2d 664, 667, 669 (9th Cir. 1993).

exacerbated those errors by merely "referr[ing] the jurors back to their flawed and inconsistent instructions," Pet.App. 22a-23a.

The full Ninth Circuit denied the state's petition for rehearing en banc, with no judge requesting a vote. Pet.App. 31a.

SUMMARY OF ARGUMENT

This is a case of conceded constitutional error – the submission of an unauthorized theory extending felony-murder liability to an aider/abettor who only joined in the robbery after the principal perpetrator's killing of the victim. The district court found the error prejudicial under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), while the Ninth Circuit reached the same result under *Stromberg v. California*, 283 U.S. 359 (1931), requiring reversal where the record does not establish whether the jury relied upon a legally unauthorized theory or on a valid alternative ground. While the Ninth Circuit characterized the error as "structural," the *Stromberg* rule is better understood as prescribing the proper application of prejudice review to an invalid theory. This Court should affirm because, though the Ninth Circuit may have employed the wrong nomenclature, it made the same

case-specific determinations necessary to a finding of prejudice under *Brecht*.[17]

In both civil and criminal cases, this Court has long held that a general verdict cannot stand where a case goes to a jury on multiple theories, one of which is legally unauthorized, and the record does not indicate whether the jurors relied upon the unauthorized theory or upon a valid, alternative ground. *Stromberg v. California*, 283 U.S. at 367-368; see Part II, *post* (discussing analogous civil cases). As recently as 1991, the Court reaffirmed the applicability of that standard to legally unauthorized (as opposed to factually unsupported) grounds of liability. *Griffin v. United States*, 502 U.S. 46 (1991).

This Court's harmless error jurisprudence has developed side-by-side with its many cases applying

---

[17] The district court first found that the state supreme court's harmless error declaration was an unreasonable application of *Chapman v. California*, 386 U.S. 18 (1967), under 28 U.S.C. § 2254(d)(1) and then conducted a separate prejudice analysis under *Brecht*. This Court has subsequently clarified that this two-stage approach is unnecessary because the *Brecht* analysis "obviously subsumes" any "AEDPA/*Chapman*" review of the state court's finding of harmlessness. *Fry v. Pliler*, 551 U.S. ___, 127 S.Ct. 2321, 2327 (2007). Consequently, although the state attempts to cast its arguments in the language of AEDPA, Pulido will focus the prejudice inquiry strictly on *Brecht*, in accordance with *Fry*. In any event, because the state court failed to consider the complete instructions and ignored other crucial aspects of the record, its decision was a classic "unreasonable application," as discussed in the district court decision, Pet.App. 54a-65a. See Part III, *post*.

the *Stromberg* rule and rests on similar principles of respect for the right to jury determination of contested facts. Although removal of an element from the jury is subject to harmless error review, that error is necessarily prejudicial where the evidence on the omitted element was in conflict. *Neder v. United States*, 527 U.S. 1, 19 (1999).

Both the district and circuit courts granted habeas relief because the record did not establish whether the jurors relied upon the unauthorized "late joiner" theory or on a legally valid alternative ground. The deadlock on the personal firearm use allegation indicated that some jurors relied on aiding/abetting, and the evidence on the timing of Pulido's assistance in the robbery was in conflict. The jury's other verdicts did not resolve that uncertainty because the defective special circumstance instructions did not require any finding of contemporaneous participation.

Despite the district and circuit courts' common focus on the uncertainty concerning the basis for the murder verdict, the courts nominally applied different standards. The district court framed its review as a traditional harmless error inquiry under *Brecht*, Pet.App. 65a-67a, while the Ninth Circuit described its application of the *Stromberg* rule as a form of "structural defect" analysis, Pet.App. 11a-12a.

The state has seized upon the Ninth Circuit's "structural defect" label and argues that the *Stromberg* rule is inconsistent with contemporary harmless error cases. The state contends that, like other

instructional errors affecting elements, submission of a legally unauthorized theory is subject to *Chapman* harmless error review on direct appeal and to the *Brecht* "substantial and injurious influence" standard on habeas review.

Pulido submits that both the state and the Ninth Circuit are half right. In view of this Court's limitation of the "structural defect" category to errors which are wholly exempt from harmless error analysis, submission of an unauthorized theory represents a form of "trial error." But *Stromberg* is fully compatible with contemporary harmless error authorities.

Stromberg is best understood as defining a rigorous form of harmless error review, analogous to *Neder*'s rule that omission of an element cannot be harmless if that element was factually disputed. *Neder v. United States*, 527 U.S. at 19. So too, where a case goes to a jury on multiple theories and the reviewing court is unable to determine whether the jury relied upon a legally unauthorized theory or upon a valid alternative ground, that uncertainty necessarily represents both a "reasonable doubt" (*Chapman*) and a "grave doubt" (*Brecht*), as to the error's effect on the verdict.

Although the Ninth Circuit was mistaken in its "structural defect" nomenclature, it is unnecessary for this Court to remand the matter, because the *substance* of the Ninth Circuit's analysis was correct. See Part IV, *post*. By applying a *Stromberg* analysis and determining that the record did not establish that the

jurors actually relied on a correct ground, the Ninth Circuit conducted exactly the inquiry required by *Brecht*. Because the Ninth Circuit has already made the requisite findings for *Brecht* prejudice, a remand would be an unnecessary exercise, and this Court should affirm the judgments of both lower courts granting habeas relief.

ARGUMENT

I. *STROMBERG V. CALIFORNIA* IS FULLY CONSISTENT WITH CONTEMPORARY HARMLESS ERROR ANALYSIS. WHERE A REVIEWING COURT CANNOT DETERMINE WHETHER THE JURORS RELIED UPON A LEGALLY UNAUTHORIZED THEORY OR ON A VALID ALTERNATIVE GROUND, THAT UNCERTAINTY REPRESENTS BOTH A "REASONABLE DOUBT" AND A "GRAVE DOUBT" AS TO THE ERROR'S EFFECT ON THE VERDICT.

A. The Conceded Constitutional Error.

Michael Pulido testified that his uncle Michael Aragon robbed the convenience store and shot the clerk. Pulido, who had remained outside in the car, had no knowledge of his uncle's robbery plans until he heard the shot and ran inside. However, he admitted assisting his uncle during the flight after the shooting – by prying open the stolen cash register and giving Aragon the cash and by disposing of the register in some roadside bushes. The prosecution tried

Pulido primarily on the theory that he alone committed the robbery and murder and that Aragon had "nothing to do" with the crime. RT 1731, 1669. But the prosecutor also passingly argued that, even if the jurors believed Pulido's "story," he was still guilty of felony murder as an aider/abettor. RT 1661.

As correctly distilled by the Solicitor General, "the case was submitted on two valid theories (respondent personally killed the victim or aided and abetted the robbery contemporaneously) and one invalid theory (respondent aided and abetted the robbery only after the killing occurred)." SG 15. On direct appeal, the California Supreme Court squarely repudiated the instructions' "late joiner" theory and held that post-killing participation in a robbery could not support felony-murder liability, but the state court declared the misinstruction harmless. Pet.App. 106a-120a.

There is no dispute that allowing a jury to convict a defendant based on conduct which does not come within the state's definition of the offense violates elementary principles of due process. *Fiore v. White*, 531 U.S. 225, 228-229 (2001); *In re Winship*, 397 U.S. 358, 364 (1970); see also *United States v. Gaudin*, 515 U.S. 506 (1995) (duty to instruct accurately on elements of offense). As the Solicitor General states, "conviction for a non-existent crime would violate the Due Process Clause." SG 16 (citing *Fiore* and

Gaudin). As it did below,[18] the state has conceded, "Unconstitutional instructional error occurred . . . because there was a reasonable likelihood that the jury found respondent guilty of felony murder by using an incorrect theory of accomplice liability – one that did not require the jury to find that respondent had aided and abetted robbery before the killing." PBM 11; see also PBM 18 (citing *Boyde v. California*, 494 U.S. 370, 380 (1990); *Estelle v. McGuire*, 502 U.S. 62, 72 & fn. 4 (1991)).[19]

It is evident that a substantial number of jurors rejected the prosecution's primary theory of personal commission and convicted Pulido as an aider/abettor. After submitting multiple questions concerning the erroneous felony-murder instructions, JA 33-54, the jurors ultimately deadlocked, either 8-4 or 4-8, on enhancing allegations of *personal* firearm use and personal infliction of great bodily injury, RT 2006-2007; see JA 27-30 (instructions on enhancements).

---

[18] Appellant's Opening Br. at 52, *Pulido v. Lamarque*, 9th Cir. No. 05-15916 [2005 WL 3128204].

[19] Both the state supreme court's repudiation of the instructions' "late joiner" theory, Pet.App. 118a-119a & fn. 5, and the state's express concession of constitutional error under the "reasonable likelihood" standard distinguish this from another habeas case, set for argument on the same date (Oct. 15, 2008). Compare Brief for Petitioner at i, 25-40, *Waddington v. Sarausad*, No. 07-772 [2008 WL 2219954] (state court upheld instructions as correct statement of accomplice liability, and state disputes circuit court's holding that instructions were ambiguous and misleading).

As the Solicitor General observes, the erroneous "late joiner" instructions implicate both the *Stromberg* line of cases on submission of an unconstitutional alternative theory, *Stromberg v. California*, 283 U.S. 359 (1931); *Griffin v. United States*, 502 U.S. 46 (1991); and the *Rose-Neder* line on misinstruction on an element of the offense, *Rose v. Clark*, 478 U.S. 570 (1986); *Neder v. United States*, 527 U.S. 1 (1999). SG 22. The state and the Solicitor General attempt to portray these as conflicting lines of authorities and urge this Court to repudiate the *Stromberg* rule. Unfortunately, the Ninth Circuit may have contributed to confusion on this score by describing *Stromberg* as a form of "structural defect" analysis.

In fact, there is no inconsistency between *Stromberg* and harmless error review. Rather than state any rule of automatic reversal, *Stromberg* defines the proper harmless error inquiry for submission of an invalid alternative theory (much as *Neder* defines the scope of such review for omission of an element).

B. The *Stromberg* Rule Requires Reversal Where the Reviewing Court Cannot Determine Whether a General Verdict Rests on an Unconstitutional Theory or on a Valid Alternative Ground.

"[T]he Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two

grounds was relied upon by the jury in reaching the verdict. [Citations.]" *Mills v. Maryland*, 486 U.S. 367, 376 (1988). The Court first articulated the rule in *Stromberg v. California*, 283 U.S. 359, 367-368 (1931), and has applied it at least a dozen times over the intervening decades.[20]

"A host of our decisions . . . has applied . . . 'the rule of the *Stromberg* case' to general-verdict convictions that may have rested on an unconstitutional ground. [Citations.]" *Griffin v. United States*, 502 U.S. 46, 55 (1991). These have included all manner of unconstitutional theories, ranging from First Amendment error in *Stromberg* itself to circumvention of grand jury consideration, *Stirone v. United States*, 361 U.S. at 216-219, violation of the Full-Faith-and-Credit Clause, *Williams v. North Carolina*, 317 U.S. at 291-304, Eighth Amendment error, *Mills v. Maryland*, 486 U.S. at 376-377, and due process

---

[20] *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Pierce v. United States*, 314 U.S. 306, 310 (1941); *Cramer v. United States*, 325 U.S. 1, 36 fn. 45 (1945); *Thomas v. Collins*, 323 U.S. 516, 528-529 (1945); *Terminello v. City of Chicago*, 337 U.S. 1, 5 (1949); *Yates v. United States*, 354 U.S. 298, 311-312 (1957) (overruled on other grounds, *Burks v. United States*, 437 U.S. 1, 8 (1978)); *Stirone v. United States*, 361 U.S. 212, 217-219 (1960); *Street v. New York*, 394 U.S. 576, 585-588 (1969); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 570-571 (1970); *Clay v. United States*, 403 U.S. 698, 704-705 (1971); *Jenkins v. Georgia*, 418 U.S. 153, 157-158 (1974); *Mills v. Maryland*, 486 U.S. at 376-377; accord *Boyde v. California*, 494 U.S. at 379-380; *Chiarella v. United States*, 445 U.S. 222, 237 fn. 21 (1980) (each recognizing the rule).

errors, e.g., *Leary v. United States*, 395 U.S. at 29-32, such as occurred here.

Over the years, the Court has refined the *Stromberg* rule. Submission of an unconstitutional or otherwise legally-unauthorized alternative ground is not reversible per se. Reversal is required only "on a record that [leaves] the reviewing court uncertain as to the actual ground on which the jury's decision rested." *Zant v. Stephens*, 462 U.S. 862, 881 (1983); see also *Griffin*, 502 U.S. at 52-56. The judgment may stand where the record affirmatively shows that the jurors made the necessary findings for the valid alternative theory, such as where they returned a separate verdict corresponding to the valid ground. *Zant* at 881.

Stromberg requires reversal only where the defect in the theory is one of *legal invalidity*, rather than insufficient factual support. *Griffin*, 502 U.S. at 56-60. The state asserts that *Griffin* "mentioned *Stromberg*'s rule of alternative-legal-theory error . . . , but again only to distinguish it." PBM 32. The Court did a good deal more than that. More so than any prior case, *Griffin* explained the rationale of the *Stromberg* rule and reaffirmed its continuing application to submission of theories which fall outside the scope of the offense or violate other constitutional precepts.

The distinction between factually unsupported and legally erroneous theories represents a "clear line" which "happens to be a line that makes good

sense." *Griffin*, 502 U.S. at 59. While "jurors *are* well equipped to analyze the evidence [citation]" and weed out factually unsupported theories, they are not similarly "equipped" to avoid legally insufficient grounds, such as a theory that "fails to come within the statutory definition of the crime." Hence, "there is no reason to think that their own intelligence and expertise will save them from that error." *Ibid.*, emphasis in original.[21]

The timing of *Griffin*'s ratification of the *Stromberg* rule is noteworthy. Like *Mills v. Maryland*, 486 U.S. at 376-377 (which applied *Stromberg* to erroneous penalty phase instructions), *Griffin* post-dates this Court's initial cases on the applicability of harmless error analysis to improper presumptions and other defective instructions on elements. *Rose v. Clark*, 478 U.S. 570 (1986); *Pope v. Illinois*, 481 U.S. 497 (1987).[22] Moreover, this Court decided *Griffin* just

---

[21] The Solicitor General states, "Unlike in *Griffin*, 'the continued adherence to the holding[s] in *Yates*' and *Stromberg is* potentially at issue in this case." SG 15, emphasis in original; but cf. *Griffin*, 502 U.S. at 56 (referring only to *Yates*). The Court did question *Yates'* extension of the *Stromberg* approach to a theory which was legally improper (a time-barred alternative ground for conviction) but which did not violate due process or any other constitutional rule. *Griffin* at 55-56; see *Yates v. United States*, 354 U.S. at 311-312. But the Court expressed no misgivings about *Stromberg*'s continuing application to constitutional error, such as submission of a ground outside the scope of the correct definition of the offense. *Griffin* at 59.

[22] See also *Carella v. California*, 491 U.S. 263 (1989); *Yates v. Evatt*, 500 U.S. 391 (1991).

eight months after *Arizona v. Fulminante*, 499 U.S. 279, 306-312 (1991), which developed the contemporary "trial error"/"structural defect" framework for determining the applicability of harmless error analysis. The *Griffin* Court plainly saw no inconsistency between the *Stromberg* rule and the principles of its harmless error jurisprudence. Instead, both lines of cases rest upon a similar respect for the jurors' constitutional prerogative to determine contested facts.

C. Harmless Error Analysis Does Not Permit a Reviewing Court to Substitute Itself for the Jury. Under *Neder*, the Removal of an Element from the Jury Cannot Be Harmless Where the Evidence on That Element Was in Conflict.

1. Standards of prejudice. There are two dimensions to any harmless error inquiry. The first is the basic standard to be applied by the reviewing court – that is, the degree of assurance necessary for a court to declare an error harmless. In *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), the Court formulated the prejudice inquiry for appellate review of federal criminal convictions as whether an "error had substantial and injurious effect or influence in determining the jury's verdict."

Two decades later, the Court adopted a more rigorous standard for review of constitutional errors in both state and federal trials. That now-familiar

test requires reversal unless the state can "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

However, where the issue arises on federal habeas review of a state conviction, the federal court should apply the *Kotteakos* "substantial and injurious effect or influence" test, rather than the *Chapman* standard applicable on direct appeal. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). In *O'Neal v. McAnnich*, 513 U.S. 432 (1995), the Court elaborated on the degree of certainty required for a prejudice finding under *Brecht*: Where the habeas court has "grave doubt" whether the error affected the verdict, such that it views the matter as in "equipoise," that uncertainty satisfies the *Brecht* test and entitles the petitioner to habeas relief. *O'Neal* at 435-438, 444-445; see also *Kotteakos*, 328 U.S. at 765.

2. Scope of harmless error review of instructional error. The other dimension of harmless error/prejudice analysis is the specific inquiry necessary for a particular category of error. While *Chapman* and *Brecht* define the degrees of assurance necessary for harmless error determinations for direct appeals and habeas review respectively, the *Rose-Neder* cases address more specifically the scope of harmless error review of various forms of instructional error. Most errors in instructing on the elements of a charged offense are susceptible to harmless error review. *Rose v. Clark*, 478 U.S. 570 (1986); *Carella v. California*, 491 U.S. 263 (1989);

Yates v. Evatt, 500 U.S. 391 (1991) (each involving improper presumption concerning an element); *Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of standard for determination of one element);[23] *California v. Roy*, 519 U.S. 2 (1996) (misstatement of intent element); *Neder v. United States*, 527 U.S. 1 (1999) (omission of one element); *Washington v. Recuenco*, 548 U.S. 212 (2006) (failure to submit enhancement).

However, the Court has drawn the line at submission of a constitutionally inadequate definition of the "reasonable doubt" burden of proof. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Because "a misdescription of the burden of proof . . . vitiates *all* the jury's findings[,] . . . [a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Id.* at 281, emphasis in original (quoting *Rose v. Clark*, 478 U.S. at 578).

---

[23] *Pope* involved a misstatement of the standard for determining whether allegedly obscene materials violated community norms. *Pope* at 500-503. While the state has attempted to characterize *Pope* as an invalid "theory" case (and to suggest that it represents a departure from *Stromberg*), PBM 14, 33, this Court's own subsequent description of *Pope* as a "misstatement of element" is much closer to the mark. *Neder v. United States*, 527 U.S. at 10; see also SG 20. (*Pope* would be more relevant to the present case if it had involved submission of two alternative bases for conviction – e.g., two distinct books or films, one of which represented constitutionally protected speech.)

In both "structural defect" cases, such as *Sullivan*, and "trial error" cases, such as *Rose* and *Neder*, the Court has scrupulously respected the jurors' constitutionally-prescribed role as arbiters of the facts, especially when the evidence is in conflict. The Court has not allowed reviewing courts to invade the jurors' province by substituting their own assessments of the weight of conflicting evidence for actual determination of those facts by jurors.

> Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee. [Citations.] *Sullivan*, 508 U.S. at 279-280, emphasis in original.

The state has aptly described *Neder v. United States* as the "culminat[ion]" of this "modern line" of cases, PBM 15. Beyond its classification of removal of an element as a form of "trial error," *Neder* defined *how* a court must conduct its harmless error review. Consistent with its earlier refusals to allow the "wrong entity" to substitute itself for the jury, *Rose*, 478 U.S. at 578; *Sullivan*, 508 U.S. at 281, the Court

recognized that any harmless error inquiry must respect "the jury trial guarantee," lest the appellate court "'become in effect a second jury to determine whether the defendant is guilty.' [Citation.]" *Neder*, 527 U.S. at 19. To avoid any "'denigration of the constitutional rights involved' [citation]," *ibid.*, the Court prescribed a rigorous framework, *which requires a finding of prejudice when the evidence on the omitted element is in conflict or genuinely disputed*:

> [S]afeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, *where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless. Neder*, 527 U.S. at 19, emphasis added.

That standard forbids any judicial reweighing of conflicting evidence or inferences. "Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19. Thus, the court determines whether the evidence was disputed or in conflict, such that the omitted element presented a genuine factual question for jury. That determination is similar to those which courts make every day in assessing whether the evidence is sufficient to permit

a defense theory or a lesser included offense to go to the jury.[24] As in those contexts, the dispositive inquiry is simply whether there is a "disputed issue of fact" on the relevant question. Cf. *Sansone v. United States*, 380 U.S. 343, 351, 353 (1965).[25] If so, then the "controverted" character of the evidence going to the omitted element compels a finding of prejudice. *Neder* at 18-19.

D. Like *Neder*, the *Apprendi* Line of Cases Reflects the Court's Refusal to Allow Judges to Supplant Jurors in Making Crucial Factual Determinations.

Although it concerns the scope of the right to jury trial, rather than the standards for review of

---

[24] Indeed, in *Rose*, this Court compared harmless error review of an unconstitutional presumption to the type of limited assessment of the evidence incident to a decision to submit a lesser included offense. *Rose v. Clark*, 478 U.S. at 581-582 & fn. 10. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. [Citations.] A parallel rule has been applied in the context of a lesser included offense instruction [citations]." *Mathews v. United States*, 485 U.S. 58, 63 (1988).

[25] As the Court admonished over a century ago, the sufficiency review incident to submission of a defense or lesser offense does *not* entail any weighing of conflicting testimony, credibility assessments, or the like. "If there were some appreciable evidence upon that subject, its proper weight and credibility were for the jury." *Stevenson v. United States*, 162 U.S. 313, 316 (1896). It "is not for the court to say, nor is it for the court to decide upon the weight to be given to them. . . ." *Id.* at 322.

violations of that right, this Court's *Apprendi* line also deserves brief mention. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007). The Court's initial development of the *Apprendi* doctrine was roughly contemporaneous with its decision in *Neder v. United States*.[26] *Apprendi* reflects the same vigilance against judicial usurpation of jurors' constitutional prerogative as finders of fact, which guided *Neder*'s formulation of the harmless error framework for omission of an element. See *Apprendi*, 530 U.S. at 476-480; *Blakely*, 542 U.S. at 305-308.

Just as a trial judge may not make additional factual determinations which increase the sentence beyond that authorized by the jurors' verdict (*Apprendi*), neither may a reviewing court, under the guise of harmless error, make its own factual determinations on an element which was improperly removed from the jury, when the evidence on that element was "contested" (*Neder*).

---

[26] During the same Term as *Neder*, the Court decided a case which proved to be a crucial precursor to *Apprendi*. *Jones v. United States*, 526 U.S. 227, 239-252 (1999) (construing statute as requiring jury determination of sentencing-enhancing fact to avoid possible constitutional infirmity). The following Term, it decided *Apprendi* itself.

E. The *Stromberg* Rule Is Consistent with the Court's Harmless Error Jurisprudence.

The *Stromberg-Griffin* rule, the *Rose-Neder* harmless error cases, and the *Apprendi* cases all rest upon a common understanding of "the need to give intelligible content to the right of jury trial." *Blakely v. Washington*, 542 U.S. at 305. We rely upon jurors to do two things: 1) to make findings of historical fact (that is, to determine what happened), guided by the reasonable doubt burden of proof; and 2) to apply the law, as stated in the judge's instructions, to those factual findings.

In assessing the effect of errors which distort the latter function (e.g., misstatement of an element, submission of an invalid legal theory), the Court has steadfastly refused to allow reviewing court judges to supplant the jurors' preeminent factfinding role by declaring errors harmless based upon their own assessments of conflicting evidence.

The state and the Solicitor General each perceive the *Stromberg* rule and *Neder*-type harmless error analysis as mutually exclusive. Ironically, in positing this dichotomy between the two, their analysis mirrors that of the Ninth Circuit opinions which they are seeking to overturn. Pet.App. 11a.

There is no tension between the *Stromberg* rule and harmless error analysis. Because a court can frequently determine that a verdict rests on a proper ground, *Stromberg* is better understood as

an application of harmless error review, rather than as a structural defect rule. Where a court's review of the record leaves it uncertain whether the jurors relied on the valid or the invalid theory, that uncertainty necessarily represents both a "reasonable doubt" (*Chapman*) and a "grave doubt" (*Brecht-O'Neal*) as to the error's effect.

The state and the Solicitor General each emphasize that it makes no sense to allow harmless error review where the only theory of liability is defective (such as where the instructions omit an element), but to require automatic reversal where the jury receives both valid and invalid theories. PBM 12, 27; SG 11, 22-25. Properly understood, the *Stromberg* rule does not result in any such anomaly.

In the typical omitted element situation, the jury is presented with an alleged factual scenario which could legitimately support a conviction, but the jurors receive an incomplete checklist of the findings necessary for that offense. See *Neder*, 527 U.S. at 12 ("absence of a complete verdict"). Where "an omitted element is supported by uncontroverted evidence" – e.g., the federally insured status of a bank, the victim's status as a police officer, or (in *Neder*) the "materiality" of a failure to report $5.5 million in income – "the erroneous instruction is properly found to be harmless." *Id.* at 17, 18. Conversely, "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – [the court] should not find the error harmless." *Id.* at 19.

Submission of a theory allowing a conviction on a factual scenario falling outside the scope of the offense will also typically involve a misstatement of one or more elements of the offense.[27] But it presents additional, more acute problems, which call for an approach to prejudice which incorporates the lessons of both the *Stromberg-Griffin* and the *Rose-Neder* lines. "Reliance" on the erroneous "late joiner" instructions means something more than a mere failure to check off one of the required findings. These jurors may have sifted through the conflicting evidence and concluded that Pulido played no role in the crime until after the shooting. Submission of an invalid theory poses the risk that the jurors may well have convicted on the basis of findings of historical fact which should have entitled the defendant to an acquittal.

The *Stromberg* rule reflects this Court's appreciation that the Constitution cannot tolerate such a risk that a defendant was convicted based upon findings of a factual scenario falling outside the scope of the offense. *Stromberg* represents a *categorical* application of harmless error analysis, comparable to *Neder*. Just as the contested character of the evidence on an omitted element requires a finding of prejudice, *Neder*, 527 U.S. at 19, the same is true of a reviewing

---

[27] See SG 22 (acknowledging that the error implicates both *Stromberg* and *Rose-Neder* "paradigms").

court's uncertainty whether the jurors based their verdict on an unconstitutional ground.

F. Where a Court's *Stromberg* Review of the Record Does Not Disclose the Actual Basis of the Jurors' Verdict, That Uncertainty Necessarily Represents Both a "Reasonable Doubt" (*Chapman*) and a "Grave Doubt" (*Brecht-O'Neal*) as to the Error's Effect on the Verdict.

Where the record provides the requisite certainty that the jurors actually relied on the valid ground, the error will be harmless. Together, the *Stromberg-Griffin* and *Rose-Neder* lines provide several tools for that determination. The reviewing court should consider: the relationship of other verdicts to the valid theory; whether there is any evidentiary support for the invalid theory; whether the evidence on the valid theory is uncontroverted or in conflict; and whether there are any affirmative indicia of the jurors' thinking.

First, submission of an invalid theory will be harmless where the jurors returned another verdict which required them to make the necessary factual findings corresponding to the valid theory. *Zant v. Stephens*, 462 U.S. at 881.[28]

---

[28] *Lara v. Ryan*, 455 F.3d 1080, 1086-1087 (9th Cir. 2006), the principal case discussed in the Ninth Circuit opinion, Pet.App. 11a, is a prime example. The instructions submitted an

(Continued on following page)

Second, we can generally be confident in jurors' ability to weed out *factually insufficient* alternative grounds. *Griffin*, 502 U.S. at 59-60. Where a legally unauthorized theory is also factually unsupported, the error will ordinarily be harmless, as several circuit courts have held.[29] Conversely, where there is evidence supporting the legally invalid theory (such as Pulido's testimony that he aided his uncle only after the shooting), the risk remains that the jurors may have convicted based upon the erroneous ground.[30]

Third, by analogy to *Neder*, the court should also consider the state of the evidence concerning the *valid* alternative theory. As in the omitted element context, that inquiry does not involve any reweighing of conflicting evidence, but simply an assessment of whether the evidence on the valid theory was "uncontroverted" or "contested." *Neder*, 527 U.S. at 18, 19. When the evidence on the valid ground is in conflict,

---

invalid "implied malice" theory of attempted murder, which did not require any finding of specific intent to kill. But the jurors also returned a separate enhancement verdict that the attempted murder was premeditated and thus also necessarily found the requisite intent to kill. See also, e.g., *LaFevers v. Gibson*, 182 F.3d 705, 716 (10th Cir. 1999).

[29] E.g., *United States v. Edwards*, 303 F.3d 606, 641 (5th Cir. 2002); *United States v. Holly*, 488 F.3d 1298, 1306 fn. 5 (10th Cir. 2007), cert. den., ___ U.S. ___, 128 S.Ct. 1870 (2008).

[30] E.g., *People v. Martinez*, 83 N.Y.2d 26, 37 [628 N.E.2d 1320, 607 N.Y.S.2d 610] (1993).

the court "should not find the error harmless." *Neder* at 19.[31]

Finally, as with other errors, the court should also examine any *affirmative indicia of the jurors' thinking,* such as juror queries touching on the erroneous instructions, *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946); *Shafer v. South Carolina*, 532 U.S. 36, 52-53 (2001); *Simmons v. South Carolina*, 512 U.S. 154, 160, 170 fn. 10 (1994), or mixed verdicts on related charges, *Olden v. Kentucky*, 488 U.S. 227, 233 (1988).

In many cases, those tools will provide the requisite certainty that the jurors actually based their verdict on the valid alternative theory. But where that review leaves the court uncertain as to the actual basis for the verdict, then it has taken harmless error as far as respect for the "jury trial guarantee," *Neder*, 527 U.S. at 19, will permit. Where there is evidentiary support for the invalid theory, the valid theory is controverted, and no other verdict conclusively establishes which theory the jurors adopted, that uncertainty compels a finding of prejudice under

---

[31] In cases such as this, where the valid and invalid theories rest upon mutually exclusive factual scenarios, the *Neder* inquiry into whether the evidence on the valid theory was contested will simply be the flip side of the *Griffin* assessment of the existence of evidentiary support for the invalid theory. The same testimony which supported the "late joiner" theory also brought the evidence on the valid alternative ground into conflict. See Pet.App. 63a (district court decision).

either a *Chapman* or a *Brecht* standard. That is especially so, if there are additional indicia (such as the juror queries here) suggesting the jurors' focus on the erroneous instructions.

A number of lower courts, both state and federal, have already harmonized *Stromberg* with harmless error review in this fashion. See *United States v. Ellyson*, 326 F.3d 522, 530-531 (4th Cir. 2003) (describing *Stromberg* analysis as "harmless error" review). Instruction on a defective theory will be harmless either where another verdict establishes the jurors' reliance on a proper ground, where the invalid theory is factually unsupported, or where the defect goes to an uncontested element. *United States v. Holly*, 488 F.3d at 1304-1307 & fn. 5; *Parker v. Secretary for Dept. of Corrections*, 331 F.3d 764, 776-779 (11th Cir. 2003).[32] But a reviewing court cannot uphold a general verdict based solely on the strength of the evidence on the valid ground. *Holly* at 1307 fn. 6; *Parker* at 778. "'[A] reasonable doubt arises [under *Chapman*], where, although the jury was instructed on alternate theories, there is no basis in the record for concluding that the verdict was based on a valid ground.' [Citations.]" (*People v. Sanchez* (2001) 86

---

[32] Cert. den. sub. nom., *Parker v. Crosby*, 540 U.S. 1222 (2004).

Cal.App.4th 970, 980 [103 Cal.Rptr.2d 809], emphasis added.[33]

Similar principles apply where the issue arises on habeas review. Where the habeas court cannot determine whether the verdict rests on the valid or the invalid ground, there is necessarily a "grave doubt" whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal v. McAnnich*, 513 U.S. at 435; *Brecht v. Abrahamson*, 507 U.S. at 627. *Stromberg* requires reversal where the record leaves the reviewing court "uncertain" which ground was basis of the jurors' verdict. *Zant v. Stephens*, 462 U.S. at 881; *Mills v. Maryland*, 486 U.S. at 376. Uncertainty is also the essence of the "grave doubt" which satisfies the *Brecht* standard. "[T]he *uncertain* judge should treat the error, not as if it were harmless, but as if it affected the verdict. . . ." *O'Neal* at 435, emphasis added.[34]

---

[33] Accord, e.g., *Campos v. Bravo*, 141 N.M. 801, 807 [161 P.3d 846] (2007); *Crespin v. People*, 721 P.2d 688, 691-692 (Colo. 1986); *United States v. Hastings*, 134 F.3d 235, 242 (4th Cir. 1998), cert. den. sub. nom., *Phillips v. United States*, 523 U.S. 1143 (1998).

[34] Recognition of the equivalence of the *Stromberg* inquiry with *Brecht* prejudice is also consistent with *O'Neal*'s observation that "our rule avoids the need for judges to read lengthy records to determine prejudice in every habeas case." *O'Neal* at 443. When a case goes to the jury on a legally unauthorized ground, a habeas court can properly confine its prejudice review to whether the verdicts affirmatively establish that the jurors

(Continued on following page)

The *Kotteakos-Brecht* standard too prohibits a reviewing court from supplanting the jury by reweighing conflicting evidence under the guise of harmless error review:

> [I]t is not the appellate court's function to determine guilt or innocence. [Citations.] Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. *Kotteakos v. United States*, 328 U.S. at 763.

Accordingly, circuit courts applying *Brecht* have refused to reweigh conflicting evidence in assessing the effect of such errors (whether characterized as removal of an element or presentation of an unauthorized theory). Any such judicial factfinding "invade[s] the province of the jury." "It is neither the proper role for a state supreme court, nor for this Court [on habeas review], to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others." *Barker v. Yukins*, 199 F.3d 867, 874-875 (6th Cir. 1999), cert. den., 530 U.S. 1229 (2000).[35]

---

relied on a valid alternative ground, whether there is any evidentiary support for the invalid theory, and whether the evidence on the valid theory is uncontroverted or in conflict. But it is neither necessary nor appropriate for it to reweigh conflicting evidence.

[35] See also, e.g., *Laird v. Horn*, 414 F.3d 419, 429 (3rd Cir. 2005), cert. den. sub. nom., *Beard v. Laird*, 546 U.S. 1146 (2006) ("Although there is clearly sufficient evidence to sustain [the valid theory], we cannot substitute ourselves for the jury by

(Continued on following page)

In the end, there is no tension between the *Stromberg-Griffin* rule governing invalid alternative theories and the harmless error principles generally applicable to other instructional errors, such as omitted elements. The two sets of rules work in tandem. When a habeas court's *Stromberg* review leaves it uncertain whether the jurors relied on a factually-supported but legally invalid theory or upon a valid but factually-contested alternative theory, that uncertainty is necessarily tantamount to a "grave doubt" as to the error's effect and entitles a habeas petitioner to relief under *Brecht* and *O'Neal*.

II. THIS COURT'S APPLICATION OF A *STROMBERG*-LIKE STANDARD TO SUBMISSION OF UNAUTHORIZED THEORIES OF LIABILITY IN *CIVIL* TRIALS FURTHER DEMONSTRATES ITS CONSISTENCY WITH THE *KOTTEAKOS-BRECHT* STANDARD. ANY ABANDONMENT OF *STROMBERG* WOULD HAVE GRAVE CONSEQUENCES FOR CIVIL, AS WELL AS CRIMINAL, APPELLATE PRACTICE.

The principle that a general verdict cannot stand in the face of uncertainty whether it rests on a legally unauthorized theory is not unique to criminal cases, nor is it dependent upon any concepts of "structural

---

speculating about what portion of the testimony the jury believed").

defect" or heightened standards of review for criminal cases.

This Court has long prescribed the identical rule for redress of the submission of unauthorized alternative theories in *civil* trials. As the Court stated in reversing an antitrust judgment due to submission of an invalid conspiracy theory: "Since we hold erroneous one theory of liability upon which the general verdict may have rested . . . it is unnecessary for us to explore the legality of the other theories." Because the verdict's "'generality prevents us from perceiving upon which plea they found. . . . the verdict cannot be upheld. . . .'" *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962) (quoting *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884)). The Court has applied that rule to unauthorized alternative theories of liability in a variety of civil contexts. *United New York & New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959) (Jones Act); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-460 (1993) (antitrust); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 384 (1991) (antitrust); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822 (1985) (civil rights/42 U.S.C. § 1983). The Court has also applied the same principles to erroneous theories for calculation of damages.

Memphis Community School Dist. v. Stachura, 477 U.S. 299, 312 (1986) (civil rights/§ 1983).[36]

There has already been a recognized cross-pollination between the *Stromberg* rule and its civil counterpart. The Court relied upon *Stromberg* in holding that "independent evidence" supporting a valid alternative ground could not render harmless the submission of an unauthorized theory of § 1983 liability: "the general verdict yields no opportunity for determining whether liability was premised on the independent evidence, or solely on the inference sanctioned by the [erroneous] instruction. [Citing *Stromberg*.]" *City of Oklahoma City v. Tuttle*, 471 U.S. at 822.

1. Consistency with *Kotteakos*. The Court's longstanding application of a *Stromberg*-like rule to unauthorized theories of civil liability has two important consequences for this case. First, it demonstrates *Stromberg*'s compatibility with the "substantial and injurious influence"/"grave doubt" habeas prejudice standard. *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *O'Neal v. McAnnich*, 513 U.S. 432 (1995). That standard derives from *Kotteakos v. United States,* 328 U.S. 750 (1946). *Kotteakos*, in turn, construed a generic federal harmless error statute, *applicable to*

---

[36] "When damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, '[the] error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict.' [Citation.]" *Memphis Community School Dist.* at 312.

both civil and criminal appeals. Former 28 U.S.C. § 391, precursor to current § 2111; see *O'Neal*, 513 U.S. at 441.

Though *Kotteakos* was a federal criminal appeal, it has guided the Court's prejudice and harmless error determinations in civil cases as well. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37 (1963) (evidentiary error prejudicial); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553-554 & fn. 4 (1984) (alleged juror misstatement on voir dire harmless). To the extent the two differ, the standard must be *more* rigorous in the criminal/habeas context (i.e., less forgiving of error), due to the liberty interests at stake. *O'Neal*, 513 U.S. at 440-441; *Kotteakos*, 328 U.S. at 762-763.

This Court's cases applying a *Stromberg*-like rule to unauthorized theories in civil cases demonstrate the compatibility of that analysis with the harmless error principles generally applicable to civil appeals.[37] The *Stromberg* rule also necessarily satisfies the similar *Kotteakos-Brecht-O'Neal* habeas prejudice standard. In both contexts, uncertainty (or, in the language of *Kotteakos* and *O'Neal*, "grave doubt") whether a general verdict rests on an unauthorized theory or on a valid alternative ground compels a finding of prejudice.

---

[37] See *Memphis Community School Dist. v. Stachura*, 477 U.S. at 312 (citing 28 U.S.C. § 2111, in finding that erroneous damages instruction was not harmless).

2. Civil consequences of any abandonment of *Stromberg*. A second consequence of this Court's longstanding application of a *Stromberg*-like standard in civil cases is that *any repudiation of the Stromberg rule in criminal/habeas cases will necessarily carry over into the civil sphere*. The Court has recognized the parallel between these civil cases and *Stromberg*, *City of Oklahoma City v. Tuttle*, 471 U.S. at 822; it has relied on *Kotteakos* in civil cases, *Tipton v. Socony Mobil Oil Co.*, 375 U.S. at 37; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 553-554 & fn. 4; and it has admonished that the *Kotteakos-Brecht* habeas standard must be at least as rigorous as civil appellate standards, *O'Neal*, 513 U.S. at 440-441; *Kotteakos*, 382 U.S. at 762-763. Consequently, any abandonment of the *Stromberg-Griffin* rule here would also doom the similar civil rule, illustrated by such cases as *Sunkist Growers*, *Sandy Hook Pilots*, and *Tuttle*.

Submission of invalid theories occurs at least as frequently in civil trials, as in criminal ones. The problem is especially acute when plaintiffs "push the envelope," either by presenting an unauthorized alternative theory of liability for a federal cause of action or by presenting a tort or other state law claim that is pre-empted by federal law. An abandonment of the Court's historic approach to general verdicts would frustrate the ability of businesses, municipalities, and other civil defendants to seek redress from liability judgments and punitive damages awards in these situations.

The risk is not a hypothetical one. On at least three occasions in recent years, business litigants have sought certiorari on claims that some lower courts have eroded the rigorous *Stromberg*-like standard of *Sunkist Growers* and *Sandy Hook Pilots* and replaced it with a more loosely-defined harmless error review. Pet. for Writ of Certiorari at 16-20, *Union Pacific Railroad Co. v. Barber*, No. 04-47 [2004 WL 1559799], cert. den., 543 U.S. 940 (2004);[38] Pet. for Writ of Certiorari at 7-8, *Advanta Corp. v. Riseman*, No. 02-882 [2002 WL 32133789], cert. den., 537 U.S. 1190 (2003); Pet. for Writ of Certiorari at 3-4, 8-9, *Mitsubishi Electric Corp. v. Ampex Corp.*, No. 99-1287 [2000 WL 34014313], cert. den., 529 U.S. 1054 (2000). The Court's re-examination of the status of the *Stromberg* rule in this habeas case necessarily puts the parallel civil standard into play as well.

Until now, in both civil and criminal contexts, the Court has taken the position that submission of an unauthorized theory requires reversal, where the record does not reveal the actual basis of the jury's general verdict. Because that rule has served the principles of fundamental fairness common to both

---

[38] In *Union Pacific Railroad*, the American Association of Railroads (AAR) also submitted an amicus brief urging the Court to grant certiorari in order to preserve the *Sunkist Growers/Sandy Hook Pilots* standard against any further such erosion. Brief of Amicus Curiae AAR at 28-30, *Union Pacific Railroad Co. v. Barber*, No. 04-47 [2004 WL 2070874].

civil and criminal trials, the Court should take this opportunity to re-affirm it.

III. UNDER *FRY V. PLILER*, THE *BRECHT* STANDARD GOVERNS HABEAS REVIEW OF HARMLESS ERROR, AND NO SEPARATE § 2254(D)(1) REVIEW IS NECESSARY.

A. *Brecht* Subsumes AEDPA Review of Harmlessness and Renders Any Separate § 2254(d)(1) Inquiry Unnecessary.

Chapman ordinarily governs a state appellate court's harmless error review, while *Brecht* governs on federal habeas review. The Court recently clarified that it is *not* necessary to conduct a separate AEDPA/28 U.S.C. § 2254(d)(1) review of the reasonableness of the state court's harmless error determination in addition to the habeas court's own independent examination under the more lenient *Brecht* standard: "[I]t certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Fry v. Pliler*, 551 U.S. ___, 127 S.Ct. 2321, 2327 (2007), emphasis in original.

As a practical matter, *Fry* renders § 2254(d)(1) largely irrelevant to a habeas court's assessment of harmless error. When the court has found constitutional error – such as here, where the state has conceded error under the "reasonable likelihood"

standard, PBM 11, 18, 22, 26 – a federal court should proceed directly to its own *Brecht* review. In view of *Fry*, the state's attempt to frame its bid to overturn *Stromberg* in the language of AEDPA, PBM 11-16, adds nothing to its argument. Indeed, elsewhere the state appears to recognize that the real question is *Brecht*, not AEDPA, because the specific disposition it requests is a remand for the Ninth Circuit to re-examine the case under *Brecht*, PBM 38; see also SG 30-31.

B. The State Court Unreasonably Failed to Consider the Complete Jury Instructions, the Jurors' Queries, and the Conflicting Evidence.

Even were a separate § 2254(d)(1) analysis necessary, the state supreme court's harmless error declaration easily meets that standard, as discussed at length in the district court's pre-*Fry* decision. Pet.App. 54a-65a.

The state court's crucial error was not its choice of standards,[39] but its failure to consider the *complete*

---

[39] Preliminarily, this is *not* a case where the state court applied *Chapman* – as the Solicitor General correctly notes, SG 30. Ironically, the state supreme court too applied a *Stromberg*-type analysis, framing the question as whether "other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory." Pet.App. 117a (citing *People v. Guiton*, 4 Cal.4th 1116, 1130 [847 P.2d 45, 17 Cal.Rptr.2d 365] (1993), which in turn relied on *Griffin v. United States*, 502 U.S.

(Continued on following page)

special circumstance instructions in declaring that they cured the error in the underlying felony-murder instructions. It quoted the first sentence of an "Introductory" special circumstance instruction, Pet.App. 116a; JA 12, without considering the subsequent substantive instruction on the specific criteria for that charge, JA 14.[40] As discussed in the district court and circuit opinions, the state court did not realize that, due to the disjunctive ("or" rather than "and") formulation, the substantive instruction authorized a special circumstance verdict without any finding that the killing was contemporaneous with Pulido's own assistance in the robbery. See Pet.App. 56a-57a, 8a & fn. 4, 10a-11a, 17a-18a.

A state court's reliance on the supposedly-curative effect of some other instruction is "objectively unreasonable" under § 2254(d)(1), where that other instruction is itself ambiguous, "internally contradictory," or otherwise defective. *Penry v. Johnson*, 532 U.S. 782, 797-800, 803-804 (2001). More generally, a state court's disposition is unreasonable under AEDPA where that court fails to consider the complete record relevant to a claim or relies on a factually mistaken understanding of its contents. Indeed, such failures have represented the most common cause of this Court's findings of unreasonable

---

46 (1991)). Consequently, whether the *Stromberg* rule is "clearly established" is beside the point. Cf. PBM 15.

[40] Cf. *Boyde v. California*, 494 U.S. at 378 ("'a single instruction . . . may not be judged in artificial isolation'").

state court decisions. E.g., *Williams v. Taylor*, 529 U.S. 362, 397 (2000) (state court "failed to evaluate the totality of the available mitigation evidence").[41]

As the district court observed, the state court also failed to consider the substantial "contrary evidence" that Pulido did not assist in the robbery until after the shooting, Pet.App. 63a. Nor did it consider the multiple queries demonstrating the jurors' focus on the erroneous felony-murder aiding/abetting instructions "and how the trial court's answers would have compounded the jury's confusion." Pet.App. 64a; see Pet.App. 59a-63a; JA 33-54. In sum, the state court "'did not undertake a careful, balanced evaluation' of the jury instructions and the record as a whole. [Citations.]" Pet.App. 54a.

Thus, *Fry* eliminates any need for a separate 2254(d)(1) review, and, even were one necessary, this is a classic "unreasonable application" case.

---

[41] See also *Wiggins v. Smith*, 539 U.S. 510, 527-529 (2003) (failure to consider information in social service records); *Rompilla v. Beard*, 545 U.S. 374, 388-390 (2005) (counsel's failure to review file of prior conviction); *Miller-El v. Dretke*, 545 U.S. 231, 240-266 (2005) (state court ignored disparate treatment of white and black jurors).

IV. THIS COURT SHOULD AFFIRM THE DISPOSITION BECAUSE, ALTHOUGH THE NINTH CIRCUIT LABELED ITS REVIEW DIFFERENTLY, ITS ACTUAL SUBSTANTIVE DETERMINATIONS CORRESPOND TO A FINDING OF PREJUDICE UNDER THE *BRECHT* STANDARD.

The Ninth Circuit properly applied the *Stromberg* rule. Because the record did not establish that the jurors had actually relied on a legitimate theory of contemporaneous aiding/abetting, it affirmed the district court's disposition granting habeas relief. However, while the district court had expressly cast its similar determination as a finding of "grave doubt" and "substantial and injurious influence" under the *Brecht-O'Neal* standard, Pet.App. 65a-67a, the Ninth Circuit described the effect of the misinstruction as "structural," Pet.App. 11a.

As the Solicitor General has stated in another context, the disposition of this case should not turn on "semantics." SG 22. The flaw in the Ninth Circuit's opinion was one of nomenclature, rather than substance. The deadlock on personal firearm use demonstrated that some jurors found "Pulido did not personally murder [the victim]." Pet.App. 5a. Pulido's account of post-killing assistance in the robbery provided evidentiary support for the invalid theory and brought the evidence on the valid theory of

contemporaneous assistance into conflict.[42] Under these circumstances, the dispositive question was whether any other verdict established that the jurors relied on the valid ground. The circuit court properly focused its inquiry on the assertedly-curative effect of the special circumstance instructions. Because the special circumstance instructions did not require any such finding of contemporaneous assistance (due to the conceded defect in the substantive body of those instructions), and nothing else in the record provided the requisite assurance that the jurors had relied on a valid ground, the circuit court affirmed the grant of habeas relief. Pet.App. 8a-12a. These are exactly the determinations which satisfy the *Brecht* prejudice standard, even though the Ninth Circuit did not label its review as a *Brecht* analysis. Under the circumstances of this case, there are no additional or different inquiries which could change the outcome.[43]

---

[42] As the district court explained, the conflicting evidence on the timing of Pulido's assistance precluded a finding of harmless error on *Neder* grounds, because Pulido "'contested the omitted element and raised evidence sufficient to support a contrary finding.'" Pet.App. 63a, quoting *Neder*, 527 U.S. at 19.

[43] The only prejudice factor not fully addressed in the per curiam opinion was the presence of affirmative indicia of the jurors' reasoning – i.e., the juror queries. (The district court discussed those queries at length, Pet.App. 59a-63a, as did Judge Thomas in his separate concurring opinion in the Ninth Circuit, Pet.App. 22a-23a.) But the state has conceded that the trial court provided "confusing answers to the jury's questions" and that those exchanges have contributed to the reasonable likelihood "that the jury applied the instructions in an

(Continued on following page)

This Court should affirm the judgments of both the circuit and district courts. Because the circuit court has already conducted the correct substantive analysis, albeit under a different label, a remand to revisit those same questions, under different nomenclature, would serve no purpose.

V. IF THE COURT CONCLUDES THAT THE NINTH CIRCUIT'S FINDINGS ARE NOT EQUIVALENT TO A *BRECHT* PREJUDICE DETERMINATION, THEN THIS COURT SHOULD REMAND THE MATTER TO THE CIRCUIT TO CONDUCT A *BRECHT* INQUIRY IN THE FIRST INSTANCE.

For the reasons stated in Part IV, though it gave its analysis a different label, the Ninth Circuit's determinations were the functional equivalent of a

---

unconstitutional way." PBM 18. Indeed, the jurors' alternative diagrams on felony-murder and their question whether an aider/abettor must have "knowledge of unlawful purpose" prior to the crime both appear directed to the liability of a defendant who had not "intended" robbery but later "facilitate[d]" that offense, JA 36-38, 41 – exactly the situation posed by the "late joiner" theory. Consequently, it is inconceivable that consideration of those queries will dispel or mitigate the circuit's uncertainty regarding the actual basis of the verdict. On the contrary, the likely impact of addition of the juror queries to the review will be to move the circuit from a position of mere "equipoise," *O'Neal v. McAnnich*, 513 U.S. at 435, to a recognition of a high likelihood that a substantial group of jurors (4 or 8) actually relied on the invalid theory. Either way, the disposition will be the same.

finding of prejudice under *Brecht* and *O'Neal*. Nonetheless, if this Court disagrees, then respondent concurs that the proper disposition would be a remand to the circuit to conduct that analysis under the proper standard. Both the state and the Solicitor General have requested such a remand, and the Solicitor General has expressly added that "the United States does not take any position" on whether the misinstruction here should be held prejudicial or harmless under *Brecht*. PBM 38; SG 31.[44]

As the Solicitor General notes, SG 31, where this Court has found that a circuit court or state appellate court failed to conduct a prejudice analysis or reviewed prejudice under an erroneous standard, it typically remands the case to that court to conduct such review under the appropriate standard. "Although we 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error was harmless . . . , we 'do so sparingly.' [Citation.]" *Rose v. Clark*, 478 U.S. at 584; *Pope v. Illinois*, 481 U.S. at 504. A remand is "our normal

---

[44] The only brief which seemingly expects this Court to conduct its own *Brecht* analysis in the first instance is that of a non-party, amicus CJLF. CJLF 15-23. Yet CJLF is also proposing a very loosely defined form of harmless error review, involving credibility judgments and reweighing of conflicting evidence. CJLF 19-21. Not only is CJLF's conception of prejudice review contrary to the lessons of *Neder* and other cases. Its argument also demonstrates why any prejudice assessment involving close review of the complete trial record should be conducted by the circuit court in the first instance.

practice where the court below has not yet passed on the harmlessness of any error." *Neder v. United States*, 527 U.S. at 25; see also, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Calderon v. Coleman*, 525 U.S. 141, 147 (1998); *California v. Roy*, 519 U.S. at 6; *Washington v. Recuenco*, 548 U.S. at 222. There is no cause to depart from that "normal practice" here.

CONCLUSION

This Court should re-affirm the *Stromberg* rule as fully consistent with its contemporary harmless error jurisprudence. The Ninth Circuit has already conducted a *Stromberg* review and has determined that the record does not establish whether the jurors relied on the valid or the invalid theory. Because the circuit court has already made the appropriate substantive determinations and its uncertainty as to the actual basis of the verdict is tantamount to a "grave doubt" under *Brecht* and *O'Neal*, this Court should affirm that decision. Alternatively, the Court should remand the matter to the Ninth Circuit for reconsideration under the *Brecht* standard.

For the foregoing reasons, respondent Michael Pulido respectfully asks this Court to affirm the judgments of the district and circuit courts.

Dated: July 11, 2008 Respectfully submitted,

J. BRADLEY O'CONNELL
Assistant Director
Counsel of Record for Respondent

REPLY BRIEF

101

(9)

No. 07-544

FILED
AUG 0 8 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CHRIS CHRONES, WARDEN, *Petitioner,*

v.

MICHAEL ROBERT PULIDO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
E-mail: jeremy.friedlander@doj.ca.gov
Counsel for Petitioner

08-277 24

TABLE OF CONTENTS

Page

ARGUMENT 1
I. Respondent's proposed harmless error test is irreconcilable with *Brecht* and *Chapman* because it makes alternative-legal-theory error necessarily reversible. 1
A. This Court has rejected formulations of the *Brecht* and *Chapman* tests that are equivalent to respondent's *Stromberg*-based harmless error test. 4
B. *Pope* v. *Illinois* demonstrates that respondent's *Stromberg*-based harmless error test conflates error and harm. 6
C. Because harmless error analysis does not entail impermissible judicial fact-finding, the *Stromberg* test is not necessary to prevent it. 11
D. Like *Chapman-Neder*, the *Brecht* test requires a determination of whether the verdict would have been the same under proper instructions. 14
II. *Stromberg*'s application to direct civil appeals poses no inconsistency with the *Brecht* test in federal habeas cases. 15
III. AEDPA restrictions on the granting of habeas relief are not mooted by respondent's concession that *Brecht* governs this case. 17
IV. Remand is required because the Ninth Circuit did not apply *Brecht*. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 11
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) . . . . . *passim*
California v. *Roy*, 519 U.S. 2 (1996) 3, 5, 10
Chapman v. *California*, 386 U.S. 18 (1967) . . . . . *passim*
Connecticut v. *Johnson*, 460 U.S. 73 (1983) 7, 9
Estelle v. *McGuire*, 501 U.S. 62 (1991) 13, 19
Fry v. *Pliler*, 551 U.S. __, 127 S.Ct. 2321 (2007) . . 15, 17
Griffin v. *United States*, 502 U.S. 46 (1991) 4, 15
Kotteakos v. *United States*, 328 U.S. 750 (1946) . . 15, 16
Lara v. *Ryan*, 455 F.3d 1080 (9th Cir. 2007) 1
Neder v. *United States*, 527 U.S. 1 (1999) . . . . . *passim*
O'Neal v. *McAninch*, 513 U.S. 432 (1995) . . . 2, 5, 15, 16
Penry v. *Johnson*, 532 U.S. 782 (2001) 14
Pope v. *Illinois*, 481 U.S. 497 (1987) 3, 6-10
Quigley v. *Vose*, 834 F.2d 14 (1st Cir. 1987) 10
Rose v. *Clark*, 478 U.S. 570 (1986) 7, 9, 11
Stromberg v. *California*, 283 U.S. 359 (1931) . . . *passim*
Suniga v. *Bunnell*, 998 F.2d 664 (9th Cir. 1993) . . . 12-14
United States v. *Dominguez*, 542 U.S. 74 (2004) 15
Washington v. *Recuenco*, 548 U.S. 212 (2006) 4

STATUTES

United States Code, Title 28
§ 2254(d)(1) 17

OTHER AUTHORITIES

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 17-19

ARGUMENT

I.

RESPONDENT'S PROPOSED HARMLESS ERROR TEST IS IRRECONCILABLE WITH *BRECHT* AND *CHAPMAN* BECAUSE IT MAKES ALTERNATIVE-LEGAL-THEORY ERROR NECESSARILY REVERSIBLE.

The Ninth Circuit found that the error in this case was governed by a rule it derived from *Stromberg* v. *California*, 283 U.S. 359 (1931): the submission to the jury of an unconstitutional alternative legal theory requires reversal if a reviewing court is uncertain whether the jury relied on that theory. See Pet. App. 11a-12a. Calling the error "structural," Pet. App. 11a, the Ninth Circuit declined to apply the harmless error test that governs non-structural error, or "trial error," on habeas review. Under that test, relief is permitted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993).

Respondent now concedes that the instructional error in this case was not structural and that the Ninth Circuit was wrong in thinking it was. RBM 17 ("the Ninth Circuit was mistaken in its 'structural defect' nomenclature"); RBM 21 ("the Ninth Circuit may have contributed to confusion on this score by describing *Stromberg* as a form of 'structural defect' analysis").[1/] Nonetheless, respondent says that the

---

1. Renouncing the "structural defect" label for the first time, respondent ignores his own earlier promotion of the Ninth Circuit's "confusion." When the Ninth Circuit sought supplemental briefs on the impact of *Lara* v. *Ryan*, 455 F.3d 1080 (9th Cir. 2007), respondent argued: "Under *Lara* and previous cases, submission of a legally unauthorized theory is a structural defect, which requires reversal where this court cannot be 'absolutely certain' the jurors relied on a correct ground." Appellee's Supplemental Letter Brief, dated Aug. 30,

Ninth Circuit was correct to apply the *Stromberg* test, as a so-called "*categorical* application of harmless error analysis." RBM 34. He thus characterizes the *Stromberg* test as equivalent to the *Brecht* test and, for that matter, to the more stringent "beyond a reasonable doubt" test for cases on direct review set forth in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). See RBM 33 ("Where a court's review of the record leaves it uncertain whether the jurors relied on the valid or the invalid theory, that uncertainty necessarily represents both a 'reasonable doubt' (*Chapman*) and a 'grave doubt' (*Brecht-O'Neal* [v. *McAninch*, 513 U.S. 432 (1995)]) as to the error's effect."); RBM 34-35. In sum, respondent argues that the Ninth Circuit inadvertently but faithfully applied the *Brecht* test by applying *Stromberg*. See RBM 35, 51.

Respondent has changed the label affixed to the Ninth Circuit's analysis, but the result is the same. In both his view and the Ninth Circuit's: (1) the error would have been harmless only if it had not occurred (i.e., if the jury had not relied on the erroneous theory), and (2) the error is necessarily prejudicial because it did occur (i.e., because the jury may have relied on the erroneous theory). By conflating error with harm, respondent elevates instructional error into "categorical" prejudice and substitutes that construct for a determination of actual harm. Respondent's "categorical" prejudice is structural error by another name.

With his *Stromberg*-based "harmless error" test,

2006, p. 2 (bold-face type and initial capitalization omitted). Respondent's opposition to the petition for certiorari similarly argued: "Uncertainty regarding the ground for a verdict requires reversal under *Stromberg*, regardless of whether the error is deemed a 'structural defect' or a 'trial error.'" Br. in Opp. 10 (bold-face type and block capitalization omitted). Only now does respondent admit no "structural defect" exists.

respondent asks this Court to accept what it has firmly rejected. In *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam), this Court found that the equivalent of respondent's test is not part of *Brecht*. In *Neder* v. *United States*, 527 U.S. 1 (1999), the Court implicitly reached the same conclusion about the *Chapman* test. See Section A, *post*.

Respondent's "*categorical* application of harmless error analysis," RBM 34, is in reality a test only for error: a reasonable likelihood that the jury misapplied the law by relying on an unconstitutional theory. *Pope* v. *Illinois*, 481 U.S. 497 (1987), exposes respondent's mistake because *Pope* is irreconcilable with respondent's harmless error analysis. See Section B, *post*.

Respondent maintains that only a *Stromberg*-type test avoids tainting harmless error analysis with fact-finding reserved for a jury. This argument rests on a misunderstanding of what a correct harmless error analysis entails. To test for harmless error, a reviewing court does not find facts, as a jury would, but instead considers the evidence in light of the jury's particular findings in order to decide whether the jury would have convicted had it been properly instructed. Respondent's *Stromberg*-based test, limited as it is to a determination of whether the jury actually relied on the correct theory, unjustifiably requires reversal of convictions when the same verdict would have resulted regardless of the error. See Section C, *post*.

This Court's *Brecht* test does not call for a *Stromberg* "jury reliance" inquiry. *Brecht* asks instead what the jury would have done absent the error. See Section D, *post*.

A. This Court Has Rejected Formulations Of The *Brecht* And *Chapman* Tests That Are Equivalent To Respondent's *Stromberg*-Based Harmless Error Test.

Respondent argues, "Where [1] there is evidentiary support for the invalid theory, [2] the valid theory is controverted, and [3] *no other verdict conclusively establishes which theory the jurors adopted*, that uncertainty compels a finding of prejudice under either a *Chapman* or a *Brecht* standard." RBM 37-38 (emphasis added). The first two prongs of this test are derived from well-settled rules. First, when alternative correct and incorrect theories are submitted to the jury, affirmance of the conviction is required if the incorrect theory is not supported by substantial evidence, *Griffin* v. *United States*, 502 U.S. 46, 60 (1991). Second, an unconstitutional omission of an element is harmless when the defense conceded the element, see *Neder* v. *United States*, 527 U.S. at 19-20. However, the harmlessness of the error when either circumstance is present does not mean that the absence of such a circumstance creates actual prejudice.[2]

---

2. Respondent misinterprets dicta in *Neder*, 527 U.S. at 19, as requiring reversal when the trial court errs by failing to instruct on an element of the offense and "*the evidence on the omitted element is in conflict or genuinely disputed*[.]" RBM 29. But *Neder* did not rule out other circumstances under which a contested omitted element would be harmless. For example, if a jury finds that the defendant used a deadly weapon but, because it was not instructed to do so, fails to determine whether the deadly weapon was a firearm, the jury's finding of deadly-weapon use may make the omission harmless even if the defendant contested both elements by saying he never used a weapon. *Washington* v. *Recuenco*, 548 U.S. 212, 220-22 (2006), found error of the foregoing type possibly harmless under *Neder* without considering whether the omitted element was contested. *Recuenco* thereby suggests that, contrary to respondent's view, an omitted element is not necessarily prejudicial if the element was contested. In any event,

Further, respondent's proposed test fails on its third prong, the notion that alternative-legal-theory error is prejudicial if "no other verdict conclusively establishes" that the jury "adopted" a correct theory. *California* v. *Roy*, 519 U.S. 2, repudiated an equivalent standard as an improper statement of the *Brecht* test. In *Roy*, the trial court's aiding and abetting instruction correctly required the jury to decide whether the defendant knew of the perpetrator's purpose but erroneously failed to require the jury to decide whether the defendant also intended to aid the perpetrator. 519 U.S. at 3. The Ninth Circuit granted habeas relief by applying an erroneously altered form of the *Brecht* standard. Under that test, "'the omission [of the "intent" part of the instruction] is harmless only if review of the facts found by the jury [namely, assistance and knowledge] establishes that the jury *necessarily* found the omitted element [namely, "intent"].'" *Id.* at 4. This Court rejected the Ninth Circuit's test, stating that "the 'harmless error' standards enunciated in *Brecht* and *O'Neal* should apply to the 'trial error' before us as enunciated in those opinions and without the Ninth Circuit's modification." *Roy*, at 6. The "verdict conclusively establishes" prong of respondent's test is no different from the "jury necessarily found" formulation the Court rejected in *Roy*.

Respondent's test also conflicts with the "beyond a reasonable doubt" harmless error test of *Chapman* v. *California*, 386 U.S. at 24. *Neder* v. *United States* held as much when it rejected the defendant's proposed test for evaluating harm from an instructional error on an element of an offense. See 527 U.S. at 13. Like respondent, the defendant in *Neder* argued that harmless error analysis

---

Neder never addressed the *Brecht* harmless error inquiry that applies in habeas corpus cases.

should focus on whether "other facts necessarily found by the jury are the 'functional equivalent' of the omitted, misdescribed, or presumed element." *Id.* The "necessarily-found, functional-equivalent" test rejected in *Neder* is indistinguishable from respondent's "verdict conclusively establishes" test. Respondent cannot explain how his proposed standard, in effect rejected by this Court as even stricter than the *Chapman* test, could nevertheless be equivalent to the less stringent *Brecht* test.

B. *Pope* v. *Illinois* Demonstrates That Respondent's *Stromberg*-Based Harmless Error Test Conflates Error And Harm.

The "verdict conclusively establishes" prong of respondent's test makes alternative-legal-theory error harmless only if the jury actually decided what it was required to decide in order to convict. Respondent's test confuses error with harm. If the record leaves uncertain whether the jury actually decided what the law requires for conviction, that uncertainty amounts to nothing more than constitutional error. A finding of error triggers rather than concludes harmless error analysis. To decide whether the error is harmless, a reviewing court considers whether, in light of the evidence, the jury's particular findings (defective and otherwise) show that the jury would still have convicted had it been properly instructed.

Pope v. *Illinois*, 481 U.S. 497, clarified the distinction between "error" and "harm" and, likewise, demonstrates how respondent's test (like *Stromberg*) conflates the two. The defendants in *Pope* were convicted of selling obscene magazines. *Id.* at 499. The trial court instructed the jury with an erroneous definition of obscenity—one that unconstitutionally required the jury to decide whether an ordinary member of the community, rather than a reasonable person, would find serious value in the allegedly obscene material. *Id.* at 500-01. The Court had to decide

"whether the convictions should be reversed outright or are subject to salvage if the erroneous instruction is found to be harmless error." *Id.* at 501. This Court remanded for a harmless error inquiry. *Id.* at 504.

In reaching its decision, the Court described in general terms what the proper harmless error test is and is not:

> To say that the jury "would have found it unnecessary to rely on the presumption," *Connecticut* v. *Johnson*, 460 U.S. 73, 97, n.5 [1983] (Powell, J., dissenting), or that the impermissible instruction was "superfluous," *Rose* [v. *Clark*], 478 U.S. 570[,] [580] (1986), is not to say that the reviewing court can retrace the jury's *deliberative processes* but that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.

Pope v. *Illinois*, 481 U.S. at 503 n.6 (emphasis added). In terms of the case before it, the Court defined harmlessness as follows: "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand." *Id.* at 503. The Court added in a footnote that "[t]he problem with the instructions in both [*Rose* and *Pope*] is that the jury could have been impermissibly aided or constrained in finding the relevant element of the crime: in *Rose*, by the erroneous presumption; in this case, by *possible reliance on* unreasonable community views on the value question." *Id.* at 503-04 n.7 (emphasis added).

Harmless error analysis does not turn, then, on "the jury's deliberative processes," *Pope*, at 503 n.6, or on the jury's "possible reliance on" an improper legal standard, *id.* at 503-04 n.7. A reviewing court asks instead whether the jury would have convicted had it been properly instructed. *Id.* at 503 n.6. *Pope* found nothing inconsistent in a verdict that was simultaneously (a) defective because of the jury's

"possible reliance" on an improper standard, yet (b) "subject to salvage if" the jury would have convicted absent the error. Those two circumstances effectively define (a) error and (b) harmless error. The error is what the jury did or *could have done wrong*—relying on an incorrect standard to find an element of the crime. The harmlessness is what the jury *would have done right*—reaching the same verdict under proper instructions. See *Neder*, 527 U.S. at 12 (absence of a "complete verdict" on every element of the offense establishes only constitutional error); *id.* at 18 (harmless error inquiry is: "Is it clear beyond a reasonable doubt that the jury would have found the defendant guilty absent the error?").

How, then, as a practical matter, can a reviewing court find both that a jury possibly relied on an erroneous instruction to find guilt—the error—yet also that the jury would still have convicted under proper instructions—the harmlessness? To state the process in general terms: the court considers the strength of the evidence in relation to the size of the "gap" between the jury's particular findings and the unmade required finding. The more strongly the evidence supports the unmade required finding, and the closer the jury's particular findings come to that finding, the more likely it will be that the jury's findings show that the jury would have made the required finding had it been properly instructed and, therefore, that the error was harmless.

Pope provides a good example. The jury found no value in the magazines under a "community" standard instead of a "reasonable person" standard. A reviewing court could conclude that the difference between the particular and required findings was small enough, and the evidence of the required finding strong enough, that the result would have been the same under a proper instruction. See *Neder* v. *United States*, 527 U.S. at 13-14 (recognizing the error in

Pope necessarily created a "'gap' between what the jury did find . . . and what it was required to find to convict[,]" yet the error was subject to harmless error analysis). As Justice Scalia put it in explaining why the error in *Pope* could be harmless, "I think it implausible that a community standard . . . would cause any jury to convict where a 'reasonable person' standard would not." *Pope* v. *Illinois*, 481 U.S. at 504 (Scalia, J., concurring).

Respondent's test of harmless error would have required a different outcome in *Pope*. If respondent's "verdict conclusively establishes" test were correct, the *Pope* Court would have proceeded to decide whether the error was reversible—much as the Court did before it fundamentally changed the harmless error test in *Rose* v. *Clark*, 478 U.S. 570. See *Connecticut* v. *Johnson*, 460 U.S. at 87 (finding reversible error based on the Court's determination that the defendant did not concede the element on which the jury was wrongly instructed). Because the remand in *Pope* would have been unnecessary if respondent's test were right, that test must be wrong.

Respondent argues that *Pope* is a "misstatement of element" case as described in *Neder*, 527 U.S. at 10, and that *Pope* "would be more relevant" had it "involved submission of two alternative bases for conviction. . . ." RBM 27 n.23. Respondent does not explain why cases addressing the harmlessness of a single-legal-theory error cannot govern cases of alternative-legal-theory error. To suggest that *Pope* is irrelevant to *Stromberg* is to embrace the anomaly that alternative-legal-theory error (with its unforgiving *Stromberg* test) is necessarily worse than single-legal-theory error (with its relatively lenient "whether the jury still would have convicted" test, as described in *Pope*).

An erroneous legal theory that would be mere trial error if the jury were instructed only on that theory (single-legal-theory error) cannot logically become more serious if the

jury is also *correctly* instructed on an alternative legal theory. *Quigley* v. *Vose*, 834 F.2d 14, 16 (1st Cir. 1987) (per curiam). *Pope* and *Roy* illustrate the principle. In *Pope*, defendants' claim could not have been strengthened if the trial court had instructed correctly, on the "reasonable person" standard, in addition to instructing incorrectly, on the "community" standard. Nor would the defective aiding and abetting instruction have been more serious in *Roy* if the trial court had correctly instructed the jury on the liability of a single perpetrator. A correct instruction cannot make an incorrect instruction worse.[3] Respondent professes not to rely on the irrational notion that a correct theory in addition to an incorrect one must be worse than an incorrect one alone, RBM 33, but his dismissal of *Pope* as single-legal-theory error rests on that very notion. RBM 27 n.23.

The error in *Stromberg* allowed the jury to convict with either an unconstitutional theory or a constitutional one. That error was no more serious than the error in *Pope*, which permitted a conviction only with an unconstitutional theory. Accordingly, the analysis for harmlessness of alternative-legal-theory errors like those in *Stromberg* and this case must be no more stringent on direct appeal than the "would the jury still have convicted" test in *Pope*. And, in the habeas context, the harmless error test must be still less stringent, under *Brecht*. Because respondent's *Stromberg*-based "conclusively-establishes" test is more stringent than the one in *Pope*, it fails.

---

3. Petitioner was trying to make this point in his merits brief in the first sentence of the first full paragraph on page 12, but the inadvertent deletion of the word "no" from the phrase "might be no worse than" changed the meaning of the sentence entirely. Also, the first full sentence on page 27 of that brief is garbled. Petitioner meant to say that alternative-legal-theory error cannot be *necessarily* worse than single-legal-theory error.

C. Because Harmless Error Analysis Does Not Entail Impermissible Judicial Fact-Finding, The *Stromberg* Test Is Not Necessary To Prevent It.

On the premise that harmless error analysis "forbids any judicial reweighing of conflicting evidence or inferences," RBM 29, respondent invokes *Neder* and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to conclude that a reviewing court may not, "under the guise of harmless error, make its own factual determinations on an element which was improperly removed from the jury, when the evidence on that element was 'contested.'" RBM 31; see RBM 32. Respondent contends that *Stromberg* prevents improper judicial fact-finding and is consistent with the *Rose-Neder* line of cases because it requires reversal when "a court's review of the record leaves it uncertain whether the jurors relied on the valid or the invalid theory. . . ." RBM 33; see RBM 34-35.

Respondent mistakes proper harmless error analysis for impermissible judicial fact-finding in the first instance. In a proper harmless error analysis, the reviewing court does not find any elements of the crime. It considers the evidence in conjunction with the jury's particular findings in order to determine what the jury would have decided under proper instructions.

This case illustrates how respondent's and the Ninth Circuit's misconceived notion of harmless error analysis formulaically produces mistaken reversals of valid convictions. As respondent would have it, the jury's failure to find the "contemporaneity" element of aiding and abetting makes the error of failing to instruct on that element prejudicial. The correct harmless error test asks a different question and compels a different result. The jury found at a minimum that respondent aided and abetted robbery as a major participant and with reckless

indifference to human life. J.A. 13. The harmless error question therefore is: given the foregoing findings and the evidence of how respondent aided and abetted robbery, both before and after the killing, would a correctly instructed jury still have convicted respondent of felony murder, properly finding that respondent aided and abetted before the killing?[4] The answer can only be yes, under any standard. Because respondent's post-killing involvement was minimal if respondent was only an accomplice, the jury's finding that he aided and abetted the robbery as a major participant showed that the jury premised that finding on pre-killing involvement. It follows that the jury would have found pre-killing aiding and abetting under proper instructions. Similarly, because respondent's post-killing involvement could not have endangered the victim's life (by definition) and did nothing to endanger anyone else's life, the jury's finding that respondent acted with reckless indifference to human life showed that the jury based its finding on pre-killing involvement. It follows that the jury would have found pre-killing aiding and abetting under proper instructions.

Suniga v. *Bunnell*, 998 F.2d 664 (9th Cir. 1993), serves as yet another illustration of how respondent's and the Ninth Circuit's misconceived notion of harmless error functions to reverse valid convictions. Charged with murder for shooting the victim, the defendant in *Suniga* claimed the gun fired accidentally. *Id.* at 666. The trial court instructed correctly on malice murder but incorrectly on felony murder, allowing the jury to convict on the latter theory by finding simply that the defendant killed the

---

4. In stating this test, petitioner assumes for argument sake that the Ninth Circuit was correct in finding that the "and/or" mistake in one of the special circumstance instructions essentially rendered meaningless the jury's special circumstance verdict form. Petitioner does not accept that assumption. See Argument IV, *post*.

victim in an assault with a deadly weapon (ADW). *Id.* at 666-67.

Without calling the error structural, the Ninth Circuit said the "very strong" evidence of malice was "beside the point" because "this is not a harmless-error case." *Id.* at 670. The court reversed the conviction because the defendant was "exposed to the possibility of conviction of felony-murder ADW when no such theory of criminality exists in California."[5] *Id.* Citing its version of the *Stromberg* rule, the Ninth Circuit said a conviction must be reversed if the jury received a correct and an incorrect theory of guilt and it is impossible to tell which theory the jury "followed." *Id.* Respondent's test would produce the same result.

A proper analysis in *Suniga* would have found harmless error. Error occurred because the trial court's instruction on felony murder produced a reasonable likelihood that the jury misapplied the law in an unconstitutional manner, *Estelle* v. *McGuire*, 501 U.S. 62, 72 & 72 n.4 (1991) —convicting the defendant of murder based only on a finding of homicide and assault, rather than a finding of malice. But the error was harmless under *Brecht* or even *Chapman* because accident was as much a defense to assault as it was to murder, and the jury rejected that defense by convicting the defendant of assault-based felony murder. Likewise, the evidence and the verdict (flawed though it was) showed that the jury would have found murder under the correct, malice theory if the jury had been instructed only on that theory. In sum: when

---

5. This point is irrelevant and misleading. The jury convicted the defendant of a greater offense, murder, by properly finding only homicide and the elements of a lesser offense, assault. The same thing happened in this case. The jury convicted respondent of felony murder by properly finding homicide and the elements of a lesser offense, robbery.

considered in light of what the jury found, the evidence showed (under any standard) that the jury would have convicted if it had been properly instructed.

Like *Suniga*, respondent fails to appreciate the way in which a harmless error analysis considers the evidence—in conjunction with the findings the jury made. That a reviewing court may not itself simply weigh the evidence does not mean (as the Ninth Circuit and respondent have assumed) that a reviewing court may not consider the evidence at all. By restricting harmless error analysis to a determination of what the jury did, rather than what the jury would have done, respondent's test prevents a reviewing court from engaging in the kind of review that this Court's harmless error jurisprudence not only permits but requires.

D. Like *Chapman-Neder*, The *Brecht* Test Requires A Determination Of Whether The Verdict Would Have Been The Same Under Proper Instructions.

In applying *Brecht*, this Court has not expressly adopted the "jury would still have convicted" formulation. But *Brecht* necessarily produces such an analysis. *Brecht* held that references at trial to the defendant's post-*Miranda* silence "did not 'substantial[ly] . . . influence' the jury's verdict" because the impermissible references "were, in effect, cumulative" to other permissible impeachment and because the evidence of guilt was, "if not overwhelming, certainly weighty." 507 U.S. at 639. To find error harmless because improper evidence is "in effect, cumulative" and the proper evidence is "weighty" is tantamount to saying that the jury would still have convicted had the impermissible evidence been excluded. See *Penry* v. *Johnson*, 532 U.S. 782, 796 (2001) (erroneously admitted evidence was harmless under *Brecht* because that evidence "was *by no means the key to* the State's case. . . .")

(emphasis added). Similarly, in *United States* v. *Dominguez*, 542 U.S. 74, 81 (2004), the Court wrote, "In cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, we have invoked a standard with similarities to the [*Brecht*] formulation in requiring the showing of 'a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.' [Citations.]" And in *Fry* v. *Pliler*, 551 U.S. _, 127 S.Ct. 2321 (2007), the dissent used this same "but-for causation" approach when it said the unconstitutional exclusion of a witness's testimony was prejudicial under *Brecht* because of "powerful support for the conclusion that if the jurors had heard the testimony . . . they would at least have had a reasonable doubt concerning petitioner's guilt." *Id.* at 2328 (Stevens, J., dissenting). Under the *Brecht* test, just as under the more stringent *Chapman* test, a reviewing court must decide whether the jury would still have convicted under proper instructions.

II.

STROMBERG'S APPLICATION TO DIRECT CIVIL APPEALS POSES NO INCONSISTENCY WITH THE *BRECHT* TEST IN FEDERAL HABEAS CASES.

Citing decisions applying *Stromberg* on direct review of civil trials, RBM 42-43, respondent argues that an "abandonment of the *Stromberg-Griffin* rule here would also doom the similar civil rule. . . ." RBM 45. As he reads *O'Neal* v. *McAninch*, 513 U.S. at 440-41, and the case from which *Brecht* derives, *Kotteakos* v. *United States*, 328 U.S. 750, 762-63 (1946), the Court has "admonished that the *Kotteakos-Brecht* standard must be at least as rigorous as civil appellate standards," RBM 45, if not more so. RBM 44.

O'Neal did not "admonish[] that the *Kotteakos-Brecht*

standard must be at least as rigorous as civil appellate standards." *O'Neal* said civil and criminal cases are the same in the way they resolve the rare situation in which a judge is in "grave doubt" (or "equipoise") as to harmlessness. *O'Neal*, 513 U.S. at 441. To observe that civil and criminal cases treat such "ties" the same way is not to imply that the harmless error standard *itself* is the same in both kinds of cases. Nor does it follow from the equivalent treatment of "ties" that harmless error analysis must be at least as stringent on federal habeas as on direct appeal in civil cases.

Kotteakos is similarly unhelpful to respondent. The Court there observed that the precursor of the current federal harmless error statute "did not require the same judgment [in a criminal case] as in one involving only some question of civil liability." *Kotteakos*, 328 U.S. at 763. "There was no purpose, for instance, to abolish the historic difference between civil and criminal causes relating to the burden of proof placed in the one upon the plaintiff and in the other on the prosecution." *Id.* Because *Kotteakos* allows for treating criminal and civil cases differently, the *Stromberg* rule may be eliminated from criminal-case harmless error review without affecting civil cases.

Respondent's demand for exact parity between the civil and criminal tests is particularly inapt in the habeas context. A federal habeas court reviews a state-court criminal judgment affirming the jury's verdict, so the balance of interests is necessarily different in such a case, see *Brecht*, 507 U.S. at 634-37, than it is when a reviewing court has yet to adjudicate a civil litigant's claims of reversible error. Even beyond the collateral nature of habeas proceedings, special federalism interests of finality and comity historically have restricted the availability of the habeas writ. See *id.* Those interests justify a harmless error test in habeas cases less stringent than the one applied on direct appeal in an ordinary civil case.

Finally, any arguable inconsistency between exclusion of *Stromberg* from criminal/habeas cases and application of *Stromberg* in civil cases would be dwarfed by the inconsistency that would arise *among* criminal cases if *Stromberg* were part of the *Brecht* test in habeas cases, as respondent proposes. As shown above, it makes no sense to apply a *Stromberg*-type test in cases of alternative-legal-theory error when the correct harmless error test for other, indistinguishable instructional errors remains whether the jury would have convicted under proper instructions.

III.

AEDPA Restrictions On The Granting Of Habeas Relief Are Not Mooted By Respondent's Concession That *Brecht* Governs This Case.

Fry v. *Pliler*, 127 S. Ct. at 2327, stated, "[I]t certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." Respondent asserts that such duplication is present here, RBM 47, and, accordingly, that "the state's attempt to frame its bid to overturn *Stromberg* in the language of AEDPA, PBM 11-16, adds nothing to its argument." RBM 48. Respondent ignores the fact that he seeks to reconfigure not only *Brecht* but also *Chapman*. As explained below, his position would, if accepted, subvert the AEDPA principle that a habeas court may not grant the writ unless the state court unreasonably applied this Court's "clearly established" precedent. 28 U.S.C. § 2254(d)(1).

The Ninth Circuit reasoned in effect that (1) alternative-legal-theory error is governed by *Stromberg*; (2) alternative-legal-theory error is "structural"; (3) *Brecht* does not apply to structural error; and, therefore, (4)

application of *Stromberg* alone is required. The parties now agree that the error is not structural and that *Brecht* applies. They disagree whether *Stromberg* governs alternative-legal-theory error. Respondent believes it does because, in his view, *Stromberg* is part of *Brecht*. But to reach that position, he relies on the notion that *Stromberg* is also incorporated in *Chapman*. RBM 35-41. Accordingly, one could not apply *Brecht* in this case in the *Stromberg*-infused way respondent urges without first deciding that *Stromberg* is also part of *Chapman* in cases of alternative-legal-theory error.

If respondent's position were correct, state courts would be required to apply *Stromberg* to alternative-legal-theory error but not to single-legal-theory error (which, all agree, is at least ordinarily governed by the "jury would still have convicted" version of *Chapman*). The battle would then shift to one of error characterization. To decide which form of *Chapman* review applies, state courts would have to decide whether the instructional error constituted alternative-legal-theory error or single-legal-theory error. If the state court classified the error as "only" single-theory error and a federal habeas court disagreed, the habeas court would proceed under respondent's proposal to apply respondent's unforgiving *Stromberg-Brecht* test—even if the state court's classification of the error as single-theory error was reasonable. AEDPA deference to the state court's initial characterization of the error would vanish.

As just suggested, respondent's "*Stromberg* is *Chapman*" approach would exalt form over substance. Instead of the required analysis of whether a given instructional error is structural, see *Neder*, 527 U.S. at 14 ("constitutional error is either structural or it is not"), respondent would have courts focus on the labeling of instructional defects as either alternative-theory error or single-theory error. Such arid debates are the antithesis of

this Court's modern harmless error jurisprudence. See *Neder*, at 10 (differently labeled errors that preclude jury from making a finding on an element of the offense are non-structural). Moreover, the labeling debate would be all but dispositive on habeas review, eliminating AEDPA-required deference to state-court determinations of harmless error.

Precisely because *Brecht* subsumes AEDPA/*Chapman*, AEDPA remains part of this case. Respondent's effort to enshrine *Stromberg* in *Brecht* and *Chapman* contradicts this Court's harmless error law and, as a result, undermines both *Brecht* deference on habeas and AEDPA deference to reasonable applications of clearly established Supreme Court law.

IV.

REMAND IS REQUIRED BECAUSE THE NINTH CIRCUIT DID NOT APPLY *BRECHT*.

Arguing in effect that the Ninth Circuit unwittingly but correctly applied *Brecht* when it applied *Stromberg*, respondent proceeds to defend the particular findings the Ninth Circuit made. RBM 51-53. As explained in Argument I, respondent misconstrues the *Brecht* test. Since the Ninth Circuit's findings were inadequate to justify the result under the correct standard, this Court need not consider them further.

In any event, the Ninth Circuit's main premise is mistaken. The court found that the "and/or" special circumstance instruction eviscerated the meaning and significance of the jury's special circumstance verdict. Pet. App. 10a-11a. In so finding, the Ninth Circuit incorrectly adopted the most damaging possible interpretation of the instruction without considering it in context. See *Estelle* v. *McGuire*, 502 U.S. at 72 (instruction must be considered not in artificial isolation but in the context of the

instructions as a whole and the trial record).

In addition, the court failed to consider that the jury found, at a minimum, that respondent aided and abetted the robbery as a major participant and with reckless indifference to human life. J.A. 13. Respondent, too, ignores that finding. As noted earlier, the jury showed by its "reckless indifference/major participant" findings that it also would have concluded, had it been properly instructed, that respondent aided and abetted the robbery before the killing.

****

Stromberg is not a test of prejudice under *Brecht*, as respondent believes. Neither is *Stromberg* clearly established as structural error and, thus, a valid reason for avoiding *Brecht*, as the Ninth Circuit believed. *Stromberg* yields findings of reversible error that *Brecht* precludes. Accordingly, this case must be remanded for the Ninth Circuit to review the error for harmlessness under a proper application of *Brecht*, shorn of concepts and authorities rooted in *Stromberg* or structural error doctrine.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: August 8, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

MANUEL M. MEDEIROS
State Solicitor General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JF:er
20130391.wpd
SF2007402455

AMICUS CURIAE BRIEF

944

4

File Date:
May 19 2008

No. 07-544

In the Supreme Court of the United States

CHRIS CHRONES, WARDEN, PETITIONER

v.

MICHAEL ROBERT PULIDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Petitioner framed the question presented as follows: "Did the Ninth Circuit fail to conform to 'clearly established' Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be 'structural error' requiring reversal because the jury might have relied on it?"

The United States will address the underlying question whether a court may apply harmless-error review when a jury is instructed on alternative theories of liability, one of which is legally flawed, and the jury returns a general verdict of guilt.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 8
Argument:
Instructional error when a jury returns a general verdict after receiving alternative theories, one of which is legally flawed, is subject to harmless-error review 11
A. The instructional error at issue implicates the *Stromberg* line of cases, which is ripe for reconsideration 12
B. This Court's harmless-error jurisprudence, as applied in the *Rose/Neder* line of cases, renders obsolete any rule of automatic reversal for instructional error 17
C. The instructional error in this habeas case should be reviewed under the *Brecht* standard of harmlessness, where review is not limited to what the jury actually found or dependent on whether the defendant contested guilt under the valid theory 28
Conclusion 32
Appendix— Clerk's transcript on appeal from the judgment of the Superior Court (May 2, 1994) 1a

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 17, 18
Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002) 24

Cases—Continued: Page

Becht v. *United States*, 403 F.3d 541 (8th Cir. 2005), cert. denied, 546 U.S. 1177 (2006) 18, 24, 25
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) ... 6, 10, 17, 30
Burks v. *United States*, 437 U.S. 1 (1978) 13
California v. *Roy*, 519 U.S. 2 (1996) 21, 30
Carella v. *California*, 491 U.S. 263 (1989) 20
Chapman v. *California*, 386 U.S. 18 (1967) 6, 9, 11, 17, 18
Cramer v. *United States*, 325 U.S. 1 (1945) 12
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 17
Dobbs v. *Zant*, 506 U.S. 357 (1993) 31
Evanchyk v. *Stewart*, 340 F.3d 933 (9th Cir. 2003), cert. denied, 541 U.S. 1067 (2004) 16
Fiore v. *White*, 531 U.S. 225 (2001) 16
Fry v. *Pliler*, 127 S. Ct. 2321 (2007) 30, 31
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 18
Gomez v. *United States*, 490 U.S. 858 (1989) 18
Gonzalez v. *United States*, No. 06-11612 (May 12, 2008) 17
Griffin v. *United States*, 502 U.S. 46 (1991) ... 9, 14, 15, 19
Johnson v. *United States*, 520 U.S. 461 (1997) 17
Kotteakos v. *United States*, 328 U.S. 750 (1946) 30
Lara v. *Ryan*, 455 F.3d 1080 (9th Cir. 2006) 7, 28
Leary v. *United States*, 395 U.S. 6 (1969) 12
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 18
Mills v. *Maryland*, 486 U.S. 367 (1988) 12
Mitchell v. *Esparza*, 540 U.S. 12 (2003) 22
Neder v. *United States*, 527 U.S. 1 (1999) ..... *passim*

Cases—Continued: Page

O'Neal v. *McAninch*, 513 U.S. 432 (1995) 30
Parker v. *Secretary for the Dep't of Corr.*, 331 F.3d 764 (11th Cir. 2003), cert. denied, 540 U.S. 1222 (2004) 25
Pope v. *Illinois*, 481 U.S. 497 (1987) 11, 20
Quigley v. *Vose*, 834 F.2d 14 (1st Cir. 1987) 24, 25
Rose v. *Clark*, 478 U.S. 570 (1986) ..... *passim*
Sandstrom v. *Montana*, 442 U.S. 510 (1979) 7, 19, 20
Schad v. *Arizona*, 501 U.S. 624 (1991) 26
Stromberg v. *California*, 283 U.S. 359 (1931) 8, 11, 12
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 18, 19, 28
Terminello v. *Chicago*, 337 U.S. 1 (1949) 12
Tumey v. *Ohio*, 273 U.S. 510 (1927) 18
United States v. *Gaudin*, 515 U.S. 506 (1995) 16
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) ... 18
United States v. *Hasting*, 461 U.S. 499 (1983) 30
United States v. *Holly*, 488 F.3d 1298 (10th Cir. 2007) 25, 26
United States v. *Neder*, 197 F.3d 1122 (11th Cir. 1999), cert. denied, 530 U.S. 1261 (2000) 29
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 18
Waller v. *Georgia*, 467 U.S. 39 (1984) 18
Washington v. *Recuenco*, 126 S. Ct. 2546 (2006) 21
Williams v. *North Carolina*, 317 U.S. 287 (1942) 12
Yates v. *Evatt*, 500 U.S. 391 (1991) 20
Yates v. *United States*, 354 U.S. 298 (1957), overruled on other grounds by *Burks* v. *United States*, 437 U.S. 1 (1978) 13, 14

Case—Continued: Page

Zant v. *Stephens*, 462 U.S. 862 (1983) 13

Constitution and statutes:

U.S. Const.:
Art. IV, § 1 (Full Faith and Credit Clause) 13
Amend. I 15, 16, 20, 24
Amend. V (Due Process Clause) 16
28 U.S.C. 2254 ..... 6, 30
Cal. Penal Code § 190.2(a)(17)(i) (West 1988) 4

Miscellaneous:

Cal. Jury Instructions–Criminal:
(5th ed. 1998) 5, 7
(5th ed. 1993 Supp.) 6

In the Supreme Court of the United States

No. 07-544

CHRIS CHRONES, WARDEN, PETITIONER

v.

MICHAEL ROBERT PULIDO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The underlying issue in this case is whether a court may apply harmless-error review when a jury is instructed on alternative theories of liability, one of which is legally flawed, and the jury returns a general guilty verdict. The United States has an interest in that issue because the Court's resolution of it will govern the treatment of similar instructional errors in federal criminal prosecutions.

STATEMENT

Following a jury trial in California state court, respondent was convicted of first-degree murder, robbery, receiving stolen property, and auto theft. Pet. App. 5a. The jury also found a "special circumstance" of robbery

felony-murder. *Ibid.* He was sentenced to imprisonment for life without parole. *Ibid.* The state appeals court and state supreme court affirmed the murder conviction. *Ibid.* The federal district court granted respondent's petition for a writ of habeas corpus on the claim of prejudicial instructional error on the murder count. *Id.* at 6a-7a. The court of appeals affirmed. *Id.* at 1a-24a.

1. a. On May 24, 1992, sometime between 1 a.m. and 5:30 a.m., Ramon Flores, a gas station cashier, was shot and killed. A neighbor heard a loud bang coming from the direction of the gas station around 3:45 a.m., then a voice yelling as if addressing someone else. The next morning, a cash register taken from the store was found in bushes on the side of a road. Respondent's fingerprints were on the cash register, as well as on an unopened can of Coke found on the store counter. The State charged respondent with first-degree murder, robbery, receiving stolen property, and auto theft. Respondent blamed the robbery and killing successively on various others, including ultimately his uncle Michael Aragon. Pet. App. 2a-3a, 5a.

b. At trial, evidence established that respondent was staying with Aragon and Laura Moore (Aragon's cohabitant). According to Aragon and Moore: Respondent was at home when they went to bed around midnight on May 23, but was gone when they got up at around 3 a.m. to care for their baby. The next morning, respondent showed Aragon his wallet and said, "Look unc, almost all ones." Later that day, Moore discovered respondent was carrying a handgun. At her direction, respondent took the gun apart. Two pieces that Moore had retained to prevent reassembly were later given to police and identified as fitting a .45-caliber Colt (the model match-

ing the cartridge found at the scene). After seeing a newspaper article about the killing, Aragon asked respondent if he committed it. Respondent denied he had, but a few days later, when Aragon asked again, respondent admitted the crime. In a letter from jail, however, respondent wrote to Moore, "If Michael is reading this, tell him I didn't kill that guy, I was just messing with him." Pet. App. 3a-4a.

Respondent testified that Aragon was solely responsible for the killing. According to respondent: On the night of May 23, after Aragon had smoked cocaine, the two drove to the gas station. Respondent waited outside while Aragon went inside the store ostensibly to purchase cigarettes. Respondent heard a gunshot and ran into the store. Aragon was holding respondent's gun. Flores was lying on the floor, bleeding from a bullet wound in his face. Respondent yelled at his uncle, ran out of the store, and got in the passenger seat of the car. A few seconds later, Aragon emerged, threw the cash register onto respondent's lap, and drove away. At Aragon's command, respondent pried open the register, gave Aragon the money, and dumped the register. Respondent denied touching a Coke can in the store that night. Pet. App. 4a-5a.

The prosecutor in closing argued that respondent was guilty of felony murder either because he acted alone as the killer and perpetrator of the robbery, or, on a theory that the prosecutor characterized as a "stretch," because he aided and abetted Aragon, knowing what Aragon intended to do as respondent waited for him outside. RT 1658-1662; Pet. App. 38a. Defense counsel argued that Aragon was the killer and perpetrator of the robbery and that respondent, who did not know of Aragon's intentions and was coerced into help-

ing Aragon dispose of the cash register, could be found guilty only as an accessory after the fact with respect to the robbery. RT 1710-1711; Pet. App. 38a.

The court's felony-murder instructions permitted the jury to find respondent guilty of felony murder if he either committed the killing in the course of the robbery or aided and abetted robbery in which a killing occurred. Pet. App. 38a. The felony-murder instructions allowed conviction as an aider and abetter even if the defendant's involvement in the robbery took place *after* the killing. *Id.* at 8a, 51a; see *id.* at 115a (jury was not instructed that "a felony murder verdict could be based on an aiding and abetting theory only if [respondent] aided and abetted the robbery before the infliction of the fatal wound").[1]

c. The jury found respondent guilty of first-degree murder, robbery, receiving stolen property, and auto theft. Pet. App. 5a. The jury also returned a "special circumstance" finding under Cal. Penal Code § 190.2(a)(17)(i) (West 1988) that the murder was committed while respondent was "ENGAGED IN OR WAS AN ACCOMPLICE IN THE COMMISSION OF OR ATTEMPTED COMMISSION OF ROBBERY." J.A. 56. The jury, however, deadlocked on allegations that respondent personally used a firearm and personally inflicted great bodily injury. Pet. App. 5a. Respondent was sentenced to life imprisonment without parole. *Ibid.*

2. The California Court of Appeal, 52 Cal. Rptr. 2d 373, and the California Supreme Court, Pet. App. 101a-120a, affirmed respondent's murder conviction.

---

[1] Relevant excerpts from the jury instructions appear in the appendix to this brief.

The state supreme court agreed with respondent that if one person, acting alone, killed another during the course of a robbery, and a second person *thereafter* assisted him in transporting and securing the stolen property, the second person was not guilty of first-degree murder under California law. Pet. App. 101a. Rather, the court held, the killer and accomplice must be jointly engaged in a robbery at the time of the killing. *Id.* at 102a; see *id.* at 115a ("[W]e decline to extend our interpretation of [California's] first degree felony-murder rule to include aiders and abettors or conspirators who join the felonious enterprise only after the murder had been completed.").

The court acknowledged that the jury instructions could have created a contrary "incorrect" implication, explaining:

> Unmodified, [Cal. Jury Instructions—Criminal (CALJIC) No. 8.27 (5th ed. 1988)] appears to tell the jury that an aider and abettor in an enumerated felony * * * is liable for first degree murder in a killing committed by anyone else engaged in the felony. In combination with the * * * instruction concerning the duration of robbery (CALJIC No. 9.40.1), CALJIC No. 8.27 could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule.

Pet. App. 118a-119a.

The state supreme court did not ultimately decide whether the trial court had a duty to instruct that post-killing aiding of the robbery was insufficient to support a felony-murder conviction, because it found that re-

spondent could not demonstrate any prejudice from the asserted instructional error. Pet. App. 116a. Specifically, the court relied on the "special circumstance" instruction (CALJIC No. 8.80.1 (5th ed. 1993 Supp.)) and verdict (J.A. 56), concluding that the jury "found—explicitly, unanimously and necessarily—that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores." *Ibid.*

3. After his state habeas petitions were denied, respondent filed a petition in federal district court pursuant to 28 U.S.C. 2254. The district court granted the petition on respondent's claim that the trial court failed to instruct the jury properly that post-killing involvement does not support felony-murder liability. Pet. App. 38a-67a.

The district court stated that "[i]t was clearly established * * * that errors involving improper instructions on a single element of the offense are reversible unless shown to be harmless beyond a reasonable doubt." Pet. App. 44a (citing, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999)). The court determined, contrary to the California Supreme Court's conclusion, that the error was not harmless under *Chapman* v. *California*, 386 U.S. 18 (1967), Pet. App. 57a-64a, and concluded that the error had a "substantial and injurious effect" on the jury's verdict under *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993), Pet. App. 65a-67a. The district court denied relief on all other claims. *Id.* at 97a.

4. The Ninth Circuit affirmed in a per curiam decision. Pet. App. 1a-24a.

At the outset, the court of appeals noted that the jury deadlocked on allegations that respondent personally

used a firearm and personally inflicted great bodily harm; the court accordingly assumed for purposes of its analysis that respondent did not personally murder Flores. Pet. App. 5a. The court stated that the felony-murder instructions erroneously "allowed conviction on the basis of after-the-murder robbery involvement" in contravention of the California Supreme Court's holding that "aiding and abetting a robbery *after* the killing of a victim does not constitute felony-murder under California law." *Id.* at 8a.

The court of appeals agreed with respondent that the state supreme court decision "was contrary to federal law because it improperly applied harmless error analysis." Pet. App. 11a. The court relied on its decision in *Lara* v. *Ryan*, 455 F.3d 1080 (9th Cir. 2006). In *Lara*, the defendant was convicted of attempted murder based on jury instructions that permitted conviction on either a theory of express malice (a legally proper theory) or implied malice (a legally improper theory). Relying in large part on *Sandstrom* v *Montana*, 442 U.S. 510 (1979), the *Lara* court held that the instructional error was structural and required reversal, unless the reviewing court could determine "with absolute certainty" that the defendant was convicted under a proper theory. 455 F.3d at 1086-1087.

The court of appeals found that the jury instructions in this case "le[ft] open the possibility that the jury convicted respondent on a legally impermissible theory, namely, that [respondent] joined the robbery only after Flores was killed." Pet. App. 11a. The court rejected the state supreme court's reliance on the special-circumstances instructions as curative, in light of the admitted error in CALJIC 8.81.17 (5th ed. 1988). The court observed, as the State conceded, that the instruction "er-

roneously used the word 'or' rather than 'and' in joining the contemporaneity prong to the 'committed in order to carry out or advance the commission of the crime' prong." Pet. App. 10a. Therefore, according to the court, the instruction "permitted the jury to find the special circumstance that the murder was committed 'while the defendant was engaged in or was an accomplice in' robbery without in fact finding that the acts were contemporaneous." *Ibid.* The court concluded that, because it could not be "'absolutely certain' that the jury found that [respondent]'s crime of robbery was committed contemporaneously with the murder, the verdict must be reversed." *Id.* at 11a-12a.

Judge O'Scannlain filed a special concurring opinion in which he agreed that the case was controlled by *Lara*, but reasoned that *Lara*'s "attempt to distinguish instructional errors involving impermissible alternative theories from other instructional errors is logically unsustainable and inconsistent with Supreme Court precedent." Pet. App. 12a-15a. Judge Thomas also filed a concurring opinion, defending *Lara*'s structural-error rule and concluding that respondent would be entitled to relief even under a harmless-error standard. *Id.* at 15a-24a.

SUMMARY OF ARGUMENT

This case lies at the intersection of two lines of this Court's precedent: *Stromberg* v. *California*, 283 U.S. 359 (1931), and successor cases, which hold that if a case is submitted to a jury on alternative theories and one of those theories is legally inadequate, a general verdict of guilt cannot stand; and *Rose* v. *Clark*, 478 U.S. 570 (1986), and its successors, which hold that harmless-error review applies to omission or misdescription of an

offense element in jury instructions. Given the development of this Court's constitutional harmless-error jurisprudence and the illogic of applying it to the latter class of cases but not the former, the Court should reconcile its precedents and apply harmlessness review uniformly to both types of instructional errors.

A. The instructional error at issue can easily be described as *Stromberg* error. Based on the instructions, the jury could have convicted respondent on a valid theory (that he personally murdered the victim or that he aided and abetted the robbery contemporaneously) or an invalid theory (he aided and abetted the robbery only after the killing occurred). Since post-killing involvement does not constitute felony murder under California law, it constitutes a defective alternative theory. A jury verdict resting on that theory would violate respondent's constitutional right to a jury finding that the state has proved *every* element of the crime beyond a reasonable doubt. Accordingly, this case implicates *Stromberg*'s rule of automatic reversal when a general verdict may rest on a constitutionally invalid theory.

B. The *Stromberg* rule, however, which this Court has deemed contrary to the common law and unworthy of further extension, see *Griffin* v. *United States*, 502 U.S. 46, 49-60 (1991), conflicts with later-developed harmless-error jurisprudence. See *Chapman* v. *California*, 386 U.S. 18 (1967). Since *Chapman*, the Court has repeatedly affirmed that constitutional errors are presumptively subject to harmless-error review. Even assuming that the *Stromberg* line of cases speaks to harmlessness—which is doubtful because it predates *Chapman*—this Court's post-*Chapman* decisions applying harmless-error review to omission or misdescription of offense elements undercut the *Stromberg* rule's continu-

ing vitality. See, *e.g.*, *Rose* v. *Clark*, *supra*; *Neder* v. *United States*, 527 U.S. 1 (1999). The instructional error at issue—the misdescription of the timing element of robbery felony murder—falls squarely within the scope of the *Rose/Neder* line of cases providing for harmless-error review. It does not rise to the level of the limited class of "structural" errors that necessarily taint the entire trial and render it fundamentally unfair. At the same time, as this case demonstrates, a *Rose/Neder* error can be substantively indistinguishable from a *Stromberg* error. And it hardly makes sense to apply a less forgiving standard of review when the instruction with the *Rose/Neder* error is conjoined with a valid alternative theory, rather than standing alone. To avoid the "patently illogical" (Pet. App. 13a (O'Scannlain, J., concurring specially)) result that adding a legally valid theory to a legally invalid theory requires stricter review than if the invalid one stood alone, this Court should apply a single rule of harmless-error review.

C. On direct review, an instructional error should be deemed harmless under *Chapman* if the reviewing court determines beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. Because this case arises on collateral review, the instructional error should be reviewed under the more forgiving standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993), under which an error is harmless unless it had "substantial and injurious effect or influence in determining the jury's verdict." Neither *Chapman* nor *Brecht* review is limited to what the jury actually found or is dependent on whether the defendant contested guilt under the valid theory. This case should be remanded for application of harmless-error review under *Brecht*.

ARGUMENT

INSTRUCTIONAL ERROR WHEN A JURY RETURNS A GENERAL VERDICT AFTER RECEIVING ALTERNATIVE THEORIES, ONE OF WHICH IS LEGALLY FLAWED, IS SUBJECT TO HARMLESS-ERROR REVIEW

This case concerns an error in the jury instructions on one element of a criminal charge—the very type of instructional error to which this Court has consistently applied harmless-error review in a line of cases after *Chapman* v. *California*, 386 U.S. 18 (1967). See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987); *Rose* v. *Clark*, 478 U.S. 570, 581-582 (1986). Specifically, the instructions at issue failed to explain properly the timing element of the aiding-and-abetting theory of robbery-based felony murder, such that the jury could have found respondent guilty based on either contemporaneous involvement (a valid theory) or post-killing involvement (an invalid theory). Although the instructional error amounts to an omission or misdescription of an element of the crime—quintessential *Rose/Neder* error—the Ninth Circuit instead applied a rule from an older series of cases commencing with *Stromberg* v. *California*, 283 U.S. 359 (1931)—namely, that if a case is submitted to a jury on alternative theories and one of those theories is legally flawed, a general verdict of guilt cannot stand. If the *Stromberg* rule (and its construction as "structural error") were enforced alongside the post-*Chapman* development of harmless-error doctrine in the *Rose/Neder* line of cases, it would lead to the anomalous and illogical result that adding a legally valid theory to a legally invalid one makes the error worse. Accordingly, this

Court should clarify that harmlessness review uniformly governs all such instructional error.

A. The Instructional Error At Issue Implicates The *Stromberg* Line Of Cases, Which Is Ripe For Reconsideration

1. The Ninth Circuit relied exclusively on the reasoning of the *Stromberg* line of cases in concluding that the instructional error was structural and thus required reversal of respondent's murder conviction. In *Stromberg*, the defendant was charged with one count of violating a California statute that prohibited the public display of a red flag for one of three purposes: opposing government, inviting anarchistic action, or aiding seditious propaganda. 283 U.S. at 362-364. The defendant was convicted under a general jury verdict that did not indicate which of the three purposes the defendant had been found guilty of pursuing. After this Court determined that it would violate the First Amendment to convict someone under the first theory of liability (opposing government), it overturned the conviction, holding that "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id.* at 368. The Court has applied this principle in a series of cases (mostly pre-1970) involving general-verdict convictions, where one of the alternative theories upon which the case was submitted was unconstitutional.[2]

---

[2] See, *e.g.*, *Leary* v. *United States*, 395 U.S. 6, 31-36 (1969) (conviction for transporting marijuana may have rested on alternate theory as to which the jury received an unconstitutional presumption instruction); *Terminello* v. *Chicago*, 337 U.S. 1, 5 (1949) (disorderly conduct conviction may have rested on alternate ground of constitutionally protected speech); *Cramer* v. *United States*, 325 U.S. 1, 29 (1945) (two of three overt acts submitted as basis for treason conviction did not satisfy the constitutional requirement that a treason conviction be based "on the Testimony of two Witnesses to the same overt Act"); *Williams* v. *North*

In *Yates* v. *United States*, 354 U.S. 298 (1957), overruled on other grounds by *Burks* v. *United States*, 437 U.S. 1 (1978), the Court extended the *Stromberg* rule to a general verdict in which one of the possible bases of conviction did not independently violate any constitutional provision, but was otherwise legally flawed. The defendants in *Yates* were charged with conspiring both to "advocate and teach" the violent overthrow of the United States and to "organize" the Communist Party. *Id.* at 300. The Court found that the "organizing" object of the conspiracy was legally flawed because the Communist Party had been "organized" (within the meaning of the statutory prohibition) when it was founded, outside the period set by the statute of limitations. *Id.* at

---

Carolina, 317 U.S. 287 (1942) (bigamy conviction may have rested on alternate theory that North Carolina did not have to recognize defendant's Nevada divorce decree in violation of the Constitution's Full Faith and Credit Clause).

Stromberg has appeared only sporadically in post-1970 decisions. See, *e.g.*, *Zant* v. *Stephens*, 462 U.S. 862, 880-881 (1983) (restating *Stromberg*'s rule in the capital context, but holding that the jury's verdict finding multiple aggravating factors was valid despite the legal invalidity of one of them). In *Mills* v. *Maryland*, 486 U.S. 367 (1988), the Court cited *Stromberg*, but the case did not involve *multiple* theories of liability; rather, the jury was instructed on a *single* theory as to the relevance of mitigating circumstances in capital sentencing. See *id.* at 375. This Court reversed the death sentence because it was unclear whether the instruction was interpreted correctly (permitting individual juror consideration of any mitigating circumstance) or incorrectly (requiring unanimity before consideration of a particular mitigating circumstance)—and not because the jury was presented with alternate valid and invalid theories. In any event, as the this Court made clear, the capital-sentencing context drove the reversal. See *id.* at 376 ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.").

311-312. Although the "advocate and teach" object was valid, the Court reversed the conspiracy conviction because "the verdict [was] supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312.

In *Griffin* v. *United States*, 502 U.S. 46 (1991), this Court declined to extend its holding in *Stromberg* and *Yates* to a general verdict of guilt in a conspiracy charging multiple objects where the evidence was insufficient to support guilt as to one of the objects. The Court noted that the rule in *Stromberg* and *Yates* was contrary to the common law, under which "a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Griffin*, 502 U.S. at 49; see *id.* at 52 (referring to *Stromberg* as "the fountainhead of decisions departing from the common law"). The Court also criticized *Yates* as an "unexplained extension" of *Stromberg* that "explicitly invok[ed] neither the Due Process Clause (which is an unlikely basis) nor our supervisory powers over the procedures employed in a federal prosecution." *Id.* at 55-56. *Stromberg*, the Court explained, does "not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Id.* at 53. After noting that "continued adherence to the holding in *Yates* [was] not at issue in [*Griffin*]," *id.* at 56, the Court refused the "unprecedented and extreme" request to extend *Yates* to situations in which the general verdict may have rested on a ground that is factually inadequate (because it is not

supported by sufficient evidence) rather than legally inadequate (because, as in *Stromberg* and *Yates*, there is some other legal impediment to prosecution), see *id.* at 56-60. The Court explained that where one possible basis for a jury verdict is factually unsupported, the jury is presumed to have rejected that basis. *Id.* at 59.

2. Unlike in *Griffin*, "the continued adherence to the holding[s] in *Yates*" and *Stromberg is* potentially at issue in this case. The instructional error here—though also falling comfortably within the realm of *Rose/Neder*, see Pt. B(2), *infra*—can easily be described as a *Stromberg/Yates* error. The jury was presented with two broad theories under which respondent could be convicted for felony murder: either that he personally killed the victim during commission of the robbery, or that he aided and abetted the commission of the robbery during which the victim was killed. Pet. App. 38a; J.A. 11. The various instructions (see App., *infra*) suggested that the jury could find respondent guilty under the aiding-and-abetting theory based on *either* contemporaneous involvement in the robbery *or* post-killing involvement in the robbery. Pet. App. 11a, 51a, 115a. Because the post-killing involvement is inadequate under California law to support a conviction for felony murder, the case was submitted on two valid theories (respondent personally killed the victim or aided and abetted the robbery contemporaneously) and one invalid theory (respondent aided and abetted the robbery only after the killing occurred).

It is true that *Stromberg* and *Yates* could be narrowly distinguished. The legally invalid ground here (non-existent crime) differs from the legally invalid ground in *Stromberg* (First Amendment-barred crime) and in *Yates* (time-barred crime). Moreover, unlike with

the defective aiding-and-abetting instruction, there was no plausible way to "correct" the defective alternative ground—and thereby apply harmless-error review to that ground—in either *Stromberg* or *Yates*.

On the other hand, just as in *Stromberg* and *Yates*, the jury's verdict here could have rested on a legally invalid ground. See *Evanchyk* v. *Stewart*, 340 F.3d 933, 940 n.2 (9th Cir. 2003) ("[*Stromberg* and *Yates*] involved jury instructions for crimes based on facially invalid or legally impossible theories, or 'non-existent' crimes."), cert. denied, 541 U.S. 1067 (2004). And while *Yates* involved non-constitutional error, this case (like *Stromberg*) involves constitutional error. Just as a conviction based on protected speech would violate the First Amendment, conviction for a non-existent crime would violate the Due Process Clause. See, *e.g.*, *Fiore* v. *White*, 531 U.S. 225, 228-229 (2001); see also *United States* v. *Gaudin*, 515 U.S. 506, 509-510 (1995) (Due process "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of *every* element of the crime with which he is charged, beyond a reasonable doubt.") (emphasis added). Moreover, if the legally flawed theory in this case were characterized as felony-murder based on post-killing involvement in the robbery, there is no clear way to "correct" the defective ground. As such, this case implicates the *Stromberg* rule—which, as discussed next, is wrong on a more fundamental level.

B. This Court's Harmless-Error Jurisprudence, As Applied In The *Rose/Neder* Line Of Cases, Renders Obsolete Any Rule Of Automatic Reversal For Instructional Error

1. This Court's post-*Stromberg/Yates* constitutional harmless-error jurisprudence has sharply eroded the precedential value of that line of cases. In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. See *id.* at 22. Since *Chapman*, this Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); see *Arizona* v. *Fulminante*, 499 U.S. 279, 306-307 (1991) (citing "wide range" of constitutional errors to which this Court has applied harmless-error review). There is a strong presumption that constitutional errors at trial are subject to harmless-error inquiry, such that "most constitutional errors can be harmless." *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 306); see *ibid.* ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.") (quoting *Rose*, 478 U.S. at 579).

By contrast, only in a "very limited class of cases" will an error be deemed "'structural,' and thus subject to automatic reversal." *Neder*, 527 U.S. at 8 (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). Unlike trial errors, structural errors "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally

unfair," *Gonzalez* v. *United States*, No. 06-11612 (May 12, 2008), slip op. 11 (quoting *Rose*, 478 U.S. at 577). See *Fulminante*, 499 U.S. at 310 ("[A] structural defect affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself."). Accordingly, only a select few errors are structural. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) (denial of counsel of choice); *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993) (deficient reasonable-doubt instruction); *Gomez* v. *United States*, 490 U.S. 858 (1989) (jury selection by a federal magistrate judge over defendant's objection); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (adjudication by biased judge).

Because *Stromberg* and *Yates* preceded *Chapman*, that line of cases simply does not address the critical question here of whether harmless-error review applies. See *Becht* v. *United States*, 403 F.3d 541, 548 (8th Cir. 2005) (*Stromberg* "establishes that there is 'error'" when "a general verdict may have rested on a ground that is forbidden by the Constitution" but "does not speak to whether the error may be harmless."), cert. denied, 546 U.S. 1177 (2006). As Justice Stewart noted in his opinion concurring in the result in *Chapman*, before that case, this Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.'" 386 U.S. at 42-43 (collecting cases). For example, neither the State in *Stromberg* (see Cal. Br. at 23-27, *Stromberg*, *supra* (No. 584)) nor the government in *Yates* (see Gov't

Br. at 94-95, *Yates*, *supra* (Nos. 6, 7, 8)) argued that a defendant's conviction may stand, even though the jury's verdict might have rested on a legally flawed ground, if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.

Accordingly, the *Stromberg/Yates* line of cases, as the Court observed in *Griffin*, 502 U.S. at 49-52, should be read only as recognizing an exception to the common-law rule, *i.e.*, that "a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49. In other words, that line of cases establishes the limited proposition that when a general verdict potentially rests on an invalid legal theory, reviewing courts may not presume that the jury relied on a valid alternative theory. *Stromberg* and its successors do not, however, resolve whether such an instructional error may be subject to harmless-error review. Cf. *Sandstrom* v. *Montana*, 442 U.S. 510, 526-527 (1979) (declining to reach issue whether possible *Stromberg*-type error could be harmless under *Chapman*).

2. To the extent the *Stromberg/Yates* line of cases establishes its species of instructional error as structural, it cannot be reconciled with post-*Chapman* developments and should be overruled. Instructional errors of the sort at issue here bear no relation to the limited category of pervasive and fundamental errors so intrinsically harmful to the framework of a trial as to be deemed structural, see Pt. B(1), *supra*, nor do they "vitiate[] *all* the jury's findings," *Sullivan*, 508 U.S. at 281. Accordingly, this Court has repeatedly and consistently held since *Chapman* that such instructional errors are

subject to harmless-error review. See, *e.g.*, *Neder*, 527 U.S. at 8-9; *Pope*, 481 U.S. at 503; *Rose*, 478 U.S. at 582.

In *Rose*, the trial court instructed the jury in a second-degree murder case that, unless the presumption was rebutted, malice is presumed solely from the fact that "a killing has occurred." 478 U.S. at 574 (citation omitted). Although the Court assumed (*id.* at 576 n.5) that the instruction violated the defendant's constitutional right to have his guilt determined beyond a reasonable doubt by a jury, see *Sandstrom*, 442 U.S. at 523-524, the Court held that such an error can be harmless under "*Chapman*'s harmless-error standard." *Rose*, 478 U.S. at 582. See also, *e.g.*, *Yates* v. *Evatt*, 500 U.S. 391, 402 (1991) (unconstitutional mandatory presumption instruction subject to harmless-error review); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (same).

The Court has also approved application of the harmless-error doctrine to instructions that erroneously describe elements of the offense, even when conviction based on such instructional error would violate the First Amendment. In *Pope*, the trial court erroneously instructed the jury that to find the defendant guilty in an obscenity case, it had to find that the material at issue lacked value under "community standards," as opposed to the "reasonable person" standard required by the First Amendment. 481 U.S. at 499-501. Under the instruction, therefore, the jury was permitted to find guilt based on protected speech. This Court nevertheless concluded that the unconstitutional misdescription of the element could be harmless "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the [defendant's material]." *Id.* at 503.

The Court has applied the same approach to partial or even complete omission of an element of a criminal offense. In *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam), in a case remarkably similar to this one, the state trial court erroneously failed to instruct the jury that it could find the defendant guilty as an aider and abettor only if it found that the defendant had the "intent or purpose" of aiding the principal's crime. *Id.* at 3 (emphasis omitted). The Court nonetheless held that "[t]he case before us is a case for application of the 'harmless error' standard." *Id.* at 5.

Similarly, in *Neder*, the instructions erroneously failed to include the materiality element of a tax-fraud offense altogether, and thus "prevent[ed] the jury from rendering a 'complete verdict' on *every* element of the offense." 527 U.S. at 11. The Court nonetheless concluded that, unlike the constitutional errors it had found to "defy harmless-error review" because they "affect[ed] the framework within which the trial proceeds," *id.* at 8, an instruction that omits an element of the offense "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *id.* at 9. Applying the same harmless-error inquiry utilized for other trial errors—whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error" (*id.* at 18)—the Court found that the failure to submit the element of materiality to the jury was harmless. *Id.* at 18-20.

This Court has since reaffirmed *Neder* and extended harmlessness review to errors in the sentencing context. See *Washington* v. *Recuenco*, 126 S. Ct. 2546, 2551-2553 (2006) (holding that *Blakely* error arising from failure to submit a sentencing factor to the jury is not structural

and is subject to harmless-error review); *Mitchell* v. *Esparza*, 540 U.S. 12, 15-17 (2003) (per curiam) (upholding harmless-error review of State's erroneous failure to charge factual circumstance necessary for imposition of death penalty).

3. As this case amply demonstrates, no logical distinction exists between the type of instructional error in the *Stromberg/Yates* line of cases (suggesting automatic reversal) and that in the more recent post-*Chapman* line of cases (applying harmless-error review). Conjoining a flawed instruction with a valid one hardly strengthens the case for a rule of automatic reversal. Both types of errors allow a jury to rest its verdict on a legally inadequate theory—that is, a jury might find guilt based on elements that do not constitute a constitutionally permissible crime. Indeed, one could easily characterize the instructional error at issue in this case as falling within the *Stromberg/Yates* paradigm (allowing conviction on either valid theory of contemporaneous involvement or invalid theory of post-killing involvement), as the Ninth Circuit did (Pet. App. 11a), and just as easily characterize it as falling squarely within the scope of the *Rose/Neder* paradigm (omitting or misdescribing timing element of the involvement), as the district court did (*id.* at 44a, 51a-52a). The governing rule should not turn on the semantics of how an essentially identical error is characterized. See *Neder*, 527 U.S. at 10 (refusing to distinguish between instructional error that takes the form of a "misdescription[]" of a broadly drawn element and one that takes the form of an "omission" of a narrowly drawn one, because "[i]n both cases—misdescriptions and omissions—the erroneous instruction precludes the jury from making a finding on the *actual* element of the offense").

Accordingly, this Court should reconcile the two lines of cases and clarify—consistent with post-*Chapman* precedents—that harmless-error review applies to all such instructional errors.

4. If any doubt remained as to whether harmless-error should govern the sorts of instructional errors at issue, the illogical implications of the Ninth Circuit's regime should eliminate them. The only noteworthy difference between a *Stromberg/Yates* error and other instructional error is that, in addition to receiving instructions on an invalid theory of liability, the jury also receives instructions on a valid one. When the instructions allow a jury to find guilt based solely on an invalid theory, this Court's harmless-error jurisprudence plainly allows such error to be reviewed for harmlessness. An instructional error on an element does not become *more* problematic because the jury may potentially have relied on an alternative theory that was entirely error-free. After all, instructions that present both a valid and an invalid theory of liability *reduce* the possibility that an ensuing verdict of guilt rests on an invalid theory. Common sense counsels against a result that permits harmlessness review for the greater, but not the lesser, instructional error. Pet. App. 13a (describing as "patently illogical" the Ninth Circuit's decision that "a jury instruction adding a legally permissible theory to a legally impermissible one somehow *increases* the gravity of the error") (O'Scannlain, J., concurring specially).

A comparison of *Stromberg* and *Pope* illustrates the incongruity. In *Stromberg*, the jury *might have* found guilt on a theory predicated on protected speech (but certainly might not have given the two other valid theories). In *Pope*, the jury *necessarily did* find guilt on such a theory (given the sole over-inclusive definition of

obscenity). Yet, in *Pope* this Court applied harmlessness review, while in *Stromberg* it did not. The facts of this case present a similar problem: if the case had been submitted on solely an aiding-and-abetting theory, presumably the defect as to the timing or contemporaneity element would have been subject to harmless-error review under *Rose/Neder*. It is difficult to conceive any reason why adding a valid direct-perpetrator theory should make the error "structural" and thus subject to automatic reversal.

The Eighth and First Circuits have made that very point when confronted with the problem of reconciling the *Stromberg/Yates* line of cases with the *Rose/Neder* line of cases:

> [Defendant's assertion] reduces to the strange claim that, because the jury here received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than in *Rose*—where the *only* charge on the critical issue was a mistaken one. That assertion cannot possibly be right, so it is plainly wrong.

Becht, 403 F.3d at 548 (quoting *Quigley* v. *Vose*, 834 F.2d 14, 16 (1st Cir. 1987) (per curiam)).

In *Becht*, the jury was instructed that child pornography means a "visual depiction [that] is, or appears to be, of a minor engaging in sexually explicit conduct." 403 F.3d at 543 n.2. In light of this Court's decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 256 (2002), that portion of the instruction that permitted conviction based on an "appears to be" theory of liability was unconstitutional under the First Amendment. The defendant sought reversal under the *Stromberg/Yates* line of cases, arguing that the error was structural. In

rejecting that claim, the Eighth Circuit held that the error at issue was analogous to the error in cases like *Pope*: "if Becht's jury had been instructed *only* on the erroneous theory that Becht possessed images of what 'appeared to be' children, then the error would have been subject to harmless-error review" under this Court's decisions in *Pope*, *Neder*, and *Rose*. *Becht*, 403 F.3d at 548. The court found that it would therefore be "anomalous to read *Stromberg* to preclude harmless-error review * * * because the jury *also* was given the option to convict based on a constitutionally *valid* theory that Becht possessed images of actual children." *Ibid.* See *Quigley*, 834 F.2d at 16 ("*Rose* plainly trumps *Stromberg*").

5. In attempting to harmonize the two lines of Supreme Court precedent, two courts of appeals have adopted an odd compromise approach: applying *Rose*/*Neder* harmless-error review to the invalid theory, but precluding reliance on the alternative valid theory as a basis for finding harmlessness. See *United States* v. *Holly*, 488 F.3d 1298, 1305-1307 (10th Cir. 2007) ("If the error is harmless as to the erroneously instructed ground considered separately, that ground is no longer insufficient to support the conviction and *Stromberg* does not require reversal"; but "*Stromberg* continues to preclude application of harmless error review to the valid ground."); *Parker* v. *Secretary for the Dep't of Corr.*, 331 F.3d 764, 777-779 (11th Cir. 2003) ("*Stromberg* cannot foreclose harmless review altogether, because an independent basis for a jury verdict is not insufficient if the relevant error is, considered separately, harmless"; but "[a]n error with regard to one independent basis for the jury's verdict cannot be rendered harmless solely because of the availability of the other inde-

pendent basis."), cert. denied, 540 U.S. 1222 (2004). Under their approach, the reviewing court may not consider whether the strength of the evidence on the alternative valid theory is so overwhelming as to render harmless the instructional error on the invalid theory, because any rational jury would have found guilt on the valid theory.[3]

That approach—while superior to the Ninth Circuit's rule of structural error—falls short. First, it is not clear how harmlessness analysis would operate on an invalid instruction such as post-killing involvement for robbery-felony murder (presumably, the corrected instruction is the same as the alternative valid theory). Second, assuming a reviewing court found the instructional error in the invalid theory *not* harmless, the court must then ignore the existence of a perfectly valid instruction submitted to the jury, even if guilt under that theory were supported by overwhelming evidence. (Suppose, for example, that a defendant were charged with first-degree murder based on alternative theories of felony-murder (robbery) and intentional murder, see *Schad* v. *Arizona*, 501 U.S. 624 (1991), and the felony-murder instruction improperly permitted a finding of guilt based on post-robbery conduct. Even if a videotape revealed that the defendant returned to the scene, drew a gun, and killed the victim in cold blood after the robbery was complete, a court would not be permitted to find the in-

---

[3] The Tenth Circuit does recognize two exceptions to its rule: where the jury has explicitly or necessarily made findings that support conviction on the valid ground, or where there is no evidence to support conviction on the invalid ground. In either scenario, the court must presume that the jury relied on the valid ground and affirm the conviction. See *Holly*, 488 F.3d at 1306 n.5. The government agrees with the results produced by both exceptions, but not the general rule.

structional error harmless.) Post-*Chapman* jurisprudence does not tolerate such a limited inquiry; rather, as this Court stated in *Neder*, the question is simply whether a rational jury would have returned the same verdict absent the error. See Pt. C.1, *infra*.

Permitting harmless-error review based solely on the valid alternative ground does not implicate the Court's observation in *Neder* that a court may not direct a verdict of guilty. See 527 U.S. at 17 & n.2. A general verdict that rests on alternative theories, one of which is legally invalid, virtually always results in a jury finding on at least some elements of a valid theory of guilt. (In the felony-murder/intentional murder case described above, for example, the jury must find the element of a killing on any available theory.) Once the jury has returned a verdict finding at least some elements of the valid theory, finding the error on the alternative theory harmless based on the conclusion that a rational jury necessarily would have found the remaining elements of the valid theory falls squarely within *Neder*'s holding.

* * * * *

In sum, given this Court's unequivocal and consistent holdings since *Chapman* that harmless-error review governs instructional error when the jury is presented with a single defective theory of liability, precedent and logic dictate that the same rule apply where the jury is instructed on multiple theories of liability and only one of them is defective. A contrary holding would contradict the last two decades of this Court's harmlessness jurisprudence in the instructional error context.

C. The Instructional Error In This Habeas Case Should Be Reviewed Under The *Brecht* Standard Of Harmlessness, Where Review Is Not Limited To What The Jury Actually Found Or Dependent On Whether The Defendant Contested Guilt Under The Valid Theory

1. Assuming this Court agrees that harmless-error review should govern the sort of instructional error at issue, the question becomes under what standard to conduct the harmlessness review. The Ninth Circuit held that the only instance in which a *Stromberg/Yates* error can be held harmless is when a reviewing court is "absolutely certain" that the jury convicted the defendant on the legally valid theory. Pet. App. 11a (citing *Lara* v. *Ryan*, 455 F.3d 1080, 1085 (9th Cir. 2006)). Similarly, respondent contends that the instructional error at issue may be deemed harmless only if a reviewing court can ascertain that the jury *actually* rested its guilty verdict on one of the legally valid theories. Br. in Opp. 11-13. *Neder* forecloses such a limited view of harmlessness in this context.

In *Neder*, this Court held that the correct harmless-error inquiry on direct review of instructional error was that articulated in *Chapman*: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18. The Court rejected defendant's argument (citing dicta from *Sullivan*, 508 U.S. at 279) that a finding of harmlessness is limited to situations where the jury actually rested its verdict on a valid theory and that a contrary rule would allow judges effectively to direct a guilty verdict. See *Neder*, 527 U.S. at 17-18. That argument, the Court observed, was "simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis." *Id.*

at 17. The Court also explained that such a limited view of harmlessness review "cannot be squared with our harmless-error cases." *Id.* at 11.[4]

Nor did the Court in *Neder* suggest that the availability of harmless-error review turns on whether the defendant contested liability under the valid theory. To the contrary, the Court specifically rejected the contention that harmlessness is limited to situations "where the defendant admitted the element on which the jury was improperly instructed." *Neder*, 527 U.S. at 13. The Court concluded on the facts of that case, "where the omitted element was uncontested and supported by overwhelming evidence," that the erroneous instruction was harmless. *Id.* at 17-19. The Court, however, did not hold conversely that omission of a contested element can never be harmless. See *United States* v. *Neder*, 197 F.3d 1122, 1129 & n.6 (11th Cir. 1999) (on remand) ("[T]he Supreme Court [in *Neder*] did not hold that omission of an element can never be harmless error unless uncontested."), cert. denied, 530 U.S. 1261 (2000). Otherwise, harmless-error review could be defeated at will by a defendant's *ipse dixit*. The Court made that point plain in *Neder* when it stated: "If, at the end of [a thorough examination of the record], the court cannot conclude beyond a reasonable doubt that the jury ver-

---

[4] As noted above (p. 27, *supra*), a *Stromberg/Yates* error does not ordinarily provide any greater concern of an impermissible directed verdict than *Rose/Neder* error. This case illustrates the point. If a court were to find harmless the instructional error in this case (permitting conviction based only on post-killing involvement) because compelling evidence existed to satisfy the contemporaneity element of aiding-and-abetting robbery felony-murder, that finding would no more constitute a directed verdict than if the timing element had been omitted in its entirety, as in *Neder*. The jury still found a killing and the defendant's culpable mental state, *i.e.*, intent to commit robbery.

dict would have been the same absent the error—for example, where the defendant contested the omitted element *and raised evidence sufficient to support a contrary finding*—it should not find the error harmless." 527 U.S. at 19 (emphasis added). See *Rose*, 478 U.S. at 583-584 ("[O]ur harmless-error cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that '*Chapman* mandates consideration of the entire record.' * * * Thus, the fact that [defendant] denied that he had [the requisite intent] does not dispose of the harmless-error question.") (quoting *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983)).

2. On habeas review, courts apply the more forgiving standard set forth in *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946): whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623; see, *e.g.*, *Roy*, 519 U.S. at 5-6 (holding that *Brecht*, not *Chapman*, governed claim of instructional error raised on federal habeas review). Under that standard, a jury verdict should be reversed only if a court has "grave doubt" about whether the verdict would have been the same absent the error. *O'Neal* v. *McAninch*, 513 U.S. 432, 436-437 (1995). As under the stricter *Chapman* standard, of course, review is not limited to what the jury actually found or dependent on whether the defendant contested guilt under the valid theory.

Just last term, the Court confirmed that the *Brecht* standard applies in Section 2254 cases, even where (like here) the state court did not itself apply the *Chapman* standard. See *Fry* v. *Pliler*, 127 S. Ct. 2321, 2325 (2007). In *Fry*, this Court held that the habeas court need not apply both *Chapman* and *Brecht*; because the more

stringent *Chapman* standard is necessarily subsumed within the relaxed *Brecht* standard, the habeas court need only apply the latter. See *id.* at 2327 ("[I]t certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former."). After *Fry*, there can be no doubt that non-structural errors—including the instructional error at issue—are subject on collateral review to the *Brecht* standard, such that the error is harmless as long as it did not have "a substantial and injurious effect" on the jury's verdict.

3. The United States does not take any position on whether the instructional error at issue was harmless under *Brecht* on the facts of this particular case. Rather, like petitioner (Br. 38), the government suggests that the Court follow its normal practice of remanding the case for application of the *Brecht* standard in the first instance. See, *e.g.*, *Dobbs* v. *Zant*, 506 U.S. 357, 359 n.* (1993) (per curiam) ("[W]e see no reason to depart here from our normal practice of allowing courts more familiar with a case to conduct their own harmless-error analyses.").[5]

---

[5] Although the district court did apply *Brecht* (after applying *Chapman*) in reviewing for harmlessness, Pet. App. 65a-67a, the court of appeals did not do so, *id.* at 11a-12a. Judge Thomas's concurring opinion conducted harmless-error review, but only under the stricter *Chapman* standard. *Id.* at 16a-23a.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PRATIK A. SHAH
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

MAY 2008

APPENDIX

COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

Court of Appeal No. A065850
Superior Court No. SC29805

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF/RESPONDENT

v.

MICHAEL ROBERT PULIDO, DEFENDANT/APPELLANT

Volume 2

CLERK'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF THE SUPERIOR
COURT, STATE OF CALIFORNIA, COUNTY OF
SAN MATEO,
BEFORE THE HONORABLE
WALTER H. HARRINGTON

Filed: May 2, 1994

APPEARANCES:

* * * * *

[460]

CALJIC 8.27
FIRST DEGREE FELONY-MURDER—AIDER AND ABETTOR
(Penal Code s. 189)

8.27

If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery, all persons, who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional, or accidental.

[J.A. 11]

[461]

CALJIC 8.80.1 (1990 New)
SPECIAL CIRCUMSTANCES—INTRODUCTORY
(Penal Code s. 190.2)

8.80.1

[J.A. 12]

* * * * *

[462]

If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider or abettor, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of robbery (Penal Code s. 190, 2(1) (17) crime) which resulted in the death of a human being, namely Ramon Flores.

[J.A. 13]

* * * * *

[463]

CALJIC 8.81.17 (1991 Revision)
SPECIAL CIRCUMSTANCES—MURDER
IN COMMISSION OF
(Penal Code s. 190.2(a) (17))

8.81.17

To find that the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved:

1. The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery; or

2. The murder was committed in order to carry out or advance the commission of the crime of

robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder.

[J.A. 14]

* * * * *

[470]

CALJIC 9.40.1 (1991 New)
ROBBERY—AIDING AND ABETTING—WHEN INTENT TO ABET MUST BE FORMED

9.40.1

For the purposes of determining whether a person is guilty as an aider and abettor to robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety.

[J.A. 21]

* * * * *

[472]

9.44(b)

For purposes of determining whether the defendant is guilty of robbery felony murder[,] the robbery continues until the robber has reached a position of temporary safety, with or without the stolen property.

[J.A. 23]

* * * * *

[475]

CALJIC 9.44 (1991 Revision)
ROBBERY—WHEN STILL IN PROGRESS/
FELONY-MURDER

9.44

For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, * * * [a] robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is in possession of the stolen property and fleeing in an attempt to escape. * * *

A robbery is complete when the perpetrator eluded any pursuers, has reached a place of temporary safety, and is in unchallenged possession of the stolen property after having effected an escape with such property.

[J.A. 26]

* * * * *

AMICUS CURIAE BRIEF

95

FILED
MAY 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(7)

No. 07-544

IN THE

Supreme Court of the United States

CHRIS CHRONES, Warden,

Petitioner,

vs.

MICHAEL ROBERT PULIDO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

492 30

QUESTION PRESENTED

When a jury instruction on felony murder omits an element of timing required by state law and the resulting conviction is challenged on federal habeas corpus, is the harmless error standard that of *Brecht* v. *Abrahamson* or must relief be granted unless the habeas court is "absolutely certain" the error was harmless?

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 7

Argument 8

I

In a habeas case, *Brecht* applies to all but a narrow class of "structural" errors, regardless of what standard may apply on direct review 8

II

The error in the present case is an instruction omitting an element, an error of the trial type .. 12

III

Applying *Brecht* to this case, the error is harmless 15

A. The harmless error standard 15

B. Pulido's trial 16

C. The jury's questions 21

Conclusion 24

TABLE OF AUTHORITIES

Cases

Boyde v. California, 494 U. S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) 9

Brecht v. Abrahamson, 507 U. S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) 1, 7, 8, 9, 10, 11

Calderon v. Coleman, 525 U. S. 141, 119 S. Ct. 500, 142 L. Ed. 2d 521 (1998) 9

California v. Roy, 519 U. S. 2, 117 S. Ct. 337, 136 L. Ed. 2d 266 (1996) 12, 13

Carella v. California, 491 U. S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) 12

Connecticut v. Johnson, 460 U. S. 73, 103 S. Ct. 969, 74 L. Ed. 2d 823 (1983) 14

Enmund v. Florida, 458 U. S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) 22

Fry v. Pliler, 551 U. S. __, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007) 9

Kotteakos v. United States, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) 16

Kyles v. Whitley, 514 U. S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) 9

Lara v. Ryan, 455 F. 3d 1080 (CA9 2006) 7, 10

McKaskle v. Wiggins, 465 U. S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) 10

Neder v. United States, 527 U. S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) 13, 14

O'Neal v. McAninch, 513 U. S. 432, 115 S. Ct. 992,
130 L. Ed. 2d 947 (1995) 7, 13, 16, 19

People v. Michaels, 28 Cal. 4th 486,
122 Cal. Rptr. 2d 285, 49 P. 3d 1032 (2002) 18

People v. Pulido, 15 Cal. 4th 713, 63 Cal. Rptr. 2d 625,
936 P. 2d 1235 (1997) 2-6, 17-21

People v. Pulido, 52 Cal. Rptr. 2d 373
(Ct. App. 1996) 2, 3, 16, 17

Price v. Vincent, 538 U. S. 634, 123 S. Ct. 1848,
155 L. Ed. 2d 877 (2003) 11

Pulido v. Chrones, 487 F. 3d 669
(CA9 2007) 7, 11, 18, 19, 23

Rose v. Clark, 478 U. S. 570, 106 S. Ct. 3101,
92 L. Ed. 2d 460 (1986) 12

Sandstrom v. Montana, 442 U. S. 510, 99 S. Ct. 2450,
61 L. Ed. 2d 39 (1979) 10, 12

Stone v. Powell, 428 U. S. 465, 96 S. Ct. 3037,
49 L. Ed. 2d 1067 (1976) 10

Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532,
75 L. Ed. 1117 (1931) 11

Sullivan v. Louisiana, 508 U. S. 275, 113 S. Ct. 2078,
124 L. Ed. 2d 182 (1993) 14

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060,
103 L. Ed. 2d 334 (1989) 10

Wainwright v. Sykes, 433 U. S. 72, 97 S. Ct. 2497,
53 L. Ed. 2d 594 (1977) 10

Washington v. Recuenco, 548 U. S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) 14

Yates v. United States, 354 U. S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957) 11

Zant v. Stephens, 462 U. S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) 10

United States Statutes

28 U. S. C. § 2254(d) 10

Rules of Court

Cal. Rules of Court 8.1100(d)(1) 2

Cal. Rules of Court 8.1115 2

State Statutes

Cal. Penal Code § 187 16

Cal. Penal Code § 189 16

Cal. Penal Code § 190.2(a)(17)(A) 5

Cal. Penal Code § 211 16

Miscellaneous

1 California Jury Instructions, Criminal (6th ed. 1996) 4

5 B. Witkin & N. Epstein, California Criminal Law, Criminal Trial (3d ed. 2000) 17

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) 10

IN THE

Supreme Court of the United States

CHRIS CHRONES, Warden,

Petitioner,

vs.

MICHAEL ROBERT PULIDO,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit in this case failed to apply the clear holding of *Brecht* v. *Abrahamson*, 507 U. S. 619

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

(1993), on the standard of review applicable in habeas corpus proceedings. That standard has served our judicial system well in helping to insure that the "secondary and limited" remedy of collateral attack on final judgments is reserved for errors of real substance, not minor issues with only a speculative connection with the reliability of the verdict. Any cutting back on *Brecht* would be a step backward and would be contrary to the interests CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Ramon Flores, a Shell gas station cashier in San Mateo, California, was killed with a single shot to the head with a .45 caliber bullet in May 1992. *People* v. *Pulido*, 15 Cal. 4th 713, 717, 936 P. 2d 1235, 1237 (1997). He died within seconds. *Ibid.* There were no witnesses to the shooting. *Ibid.*

The next morning, the cash register from the store was found in some roadside bushes. *Ibid.* Michael Pulido's fingerprints were on the register. *Ibid.* His fingerprints were also found on an unopened can of Coke found on the store counter. *Ibid.* A neighbor told police he had heard a loud bang and yelling come from the direction of the Shell station early in the morning of the murder. *Ibid.* He told police it sounded like a person was addressing someone else. *Ibid.*

Michael Pulido was arrested on an unrelated charge in June 1992. *People* v. *Pulido*, 52 Cal. Rptr. 2d 373, 376 (Ct. App. 1996).[2] Pulido, "hoping to avoid jail," volunteered information about the Shell station rob-

---

2. The opinion of the Court of Appeal for the First Appellate District has been superseded by grant of review and is cited only for its discussion of the facts of this case. See Cal. Rules of Court 8.1100(d)(1) & 8.1115.

bery. *Id.*, at 376-377. He led police to a location where they found discarded, unused .45 caliber cartridges with markings similar to those found at the murder location. *Pulido*, 15 Cal. 4th, at 717, 936 P. 2d, at 1237. Pulido also made a series of inconsistent exculpatory statements attributing the robbery and murder to others, before finally blaming the killing on Michael Aragon, his uncle, with whom Pulido was living at the time of Flores' murder. *Id.*, at 717-718, 936 P. 2d, at 1237.

At trial, Aragon testified against Pulido. *Id.*, at 717, 936 P. 2d, at 1237. Aragon testified that a few days after the killing, Pulido had admitted to Aragon that he killed Flores. *Id.*, at 718, 936 P. 2d, at 1237. Aragon testified Pulido told him he had bought a Coke, shot Flores in the face, took the register and then threw it in the bushes. *Ibid.* Aragon testified that on the morning of the killing, Aragon found Pulido asleep in the living room with his clothes on. *Id.*, at 717, 936 P. 2d, at 1237. Aragon also claimed that the same morning Pulido had proudly displayed to Aragon a large number of $1 bills in his wallet. *Ibid.*

Pulido told a different story. Pulido testified that in the early morning of the murder, Aragon had taken Pulido to a park where Aragon smoked some cocaine. *Id.*, at 718, 936 P. 2d, at 1238. After leaving the park, Aragon stopped at the Shell station to buy cigarettes or matches. *Ibid.* Pulido claimed Aragon murdered Flores while Pulido waited outside. *Ibid.* He claimed to have no knowledge that Aragon planned to rob the Shell station or kill Flores. *Ibid.* Pulido testified that it was Aragon who had taken the register, and it was only after Aragon threatened him with the gun that Pulido had opened the cash register. *Ibid.* Pulido specifically "denied touching a Coke can in the store that night." *Ibid.* To explain his fingerprints on the Coke can, Pulido suggested he might have touched the can when

he bought a drink at the Shell station on some earlier occasion. *Ibid.*

Prior to closing arguments, the jury was given relevant jury instructions. J. A. 4-11. From June 29, 1993, until the close of deliberations on July 2, 1993, the jury actively questioned the trial court as to the meaning of the jury instructions. *Id.*, at 33-54. The first question asked the judge to clarify whether finding "aiding and abetting" as defined by the then-current standard instruction, CALJIC 3.01,[3] was equivalent to finding the defendant had committed robbery. *Id.*, at 33. The trial court responded in the affirmative. *Id.*, at 34. The next jury question concerned the definition of first-degree felony-murder aider and abettor liability under CALJIC 8.27. *Id.*, at 36-38. Diagrams from the jury demonstrate jury confusion as to two possible theories of felony-murder aider and abettor liability the jury could use to convict Pulido. *Ibid.* The jury was instructed to "reread CALJIC 8.27 with the definition of aiding and abetting in mind from instruction 3.01." *Id.*, at 39. CALJIC 3.01 stated, "Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting." *Id.*, at 32. The next day, the jury asked whether an aider or abettor had to possess knowledge of the purpose of the crime "prior to the commission of the crime or during the commission of the crime." See *id.*, at 41. The jury was instructed to read CALJIC 3.01. *Id.*, at 43. The same day, the jury requested the trial court clarify whether the "crime" referred to in CALJIC 8.27 was the crime of murder or robbery. *Id.*, at 48. The trial court instructed the jury that the "crime" was robbery. *Id.*, at 49. The final questions from the jury

---

3. The instruction was subsequently amended. See 1 California Jury Instructions, Criminal 3.01 (6th ed. 1996) (CALJIC).

came on July 1, 1993, and July 2, 1993, and concerned the instructions regarding other sentence enhancements. *Id.*, at 51, 53. The jury specifically asked if failure to find a "unanimous agreement on the use of a firearm and the 'bodily injury' [for murder or robbery] would *negate unanimity on the main counts themselves.*" *Id.*, at 51 (emphasis added). The trial court instructed the jury that the court would still "receive the verdicts to which you do agree." *Id.*, at 54.

The jury convicted Pulido of robbery and first-degree murder. *Pulido*, 15 Cal. 4th, at 719, 936 P. 2d, at 1238; see also J. A. 55, 57. They also found true a robbery-murder special-circumstance allegation under Cal. Penal Code § 190.2(a)(17)(A). *Pulido*, 15 Cal. 4th, at 719, 936 P. 2d, at 1238. In the verdict form, the jury found "the defendant . . . engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission* of the crime charged in Count 1 . . . ." J. A. 56 (emphasis added, capitalization omitted). Count 1 was the murder. See J. A. 57. Pulido was sentenced to a life term without the possibility of parole. *Pulido*, 15 Cal. 4th, at 719, 936 P. 2d, at 1238. The Court of Appeal affirmed the sentence and conviction. *Ibid.*

In a unanimous decision, the California Supreme Court affirmed. *Id.*, at 716, 730, 936 P. 2d, at 1237, 1245. In affirming, the California court decided that California's felony-murder rule does not include those who joined a felonious enterprise after a murder was completed. *Id.*, at 722, 936 P. 2d, at 1240. Instead, the court ruled that, at a minimum, a nonkiller accomplice in a felony murder must have been "a conspirator or aider or abettor in the felony[,]" at the time of the killing. *Id.*, at 723, 936 P. 2d, at 1241.

The court also found that failure by the trial court to instruct the jury on this rule in the present case did

not prejudice Pulido. *Id.*, at 726-727, 936 P. 2d, at 1243. The court found Pulido did not suffer prejudice because the robbery-murder special-circumstance finding had supplied the missing element.

> "Postkilling assistance to Aragon, by itself, could not have been the basis for the jury's explicit finding defendant 'engaged in or was an accomplice in the commission of or attempted commission of robbery *during* the commission of [murder],' nor could it have satisfied the instructional requirement that 'the murder was committed *while* the defendant was engaged or was an accomplice in' robbery. (Italics added.) The special-circumstance finding thus demonstrates the jury did not accept the theory defendant joined the robbery only after Flores was killed. Any error in the failure specially to instruct on this issue was harmless." *Id.*, at 727, 936 P. 2d, at 1243-1244.

The court further concluded that because Pulido had not demonstrated prejudice, reversal was not required. *Id.*, at 727, 936 P. 2d, at 1244.

Pulido petitioned for federal habeas corpus in 1999, and the District Court granted the writ in 2005. J. A. 1. The District Court rejected the California Supreme Court's holding that the jury's special-circumstance verdict that Pulido was engaged in the robbery during the murder of Flores eliminated the possibility that the jury found Pulido guilty for a crime he committed after Flores had been murdered. App. to Pet. for Cert. 50a-51a. The District Court rejected the California Supreme Court's interpretation because an invalid robbery-murder special-circumstance instruction, which substituted "or" for "and," could have permitted the jury to find Pulido guilty of aiding or abetting felony murder if he participated in the robbery after Flores was killed. *Id.*, at 51a. Although the erroneous jury instructions

were not questioned by the jury during its deliberations, see J. A. 33-54, the District Court found failure to inform the jury of the "crucial timing element for felony murder accomplice liability amounted to federal constitutional error." App. to Pet. for Cert. at 51a. The District Court then found the California Supreme Court's decision that Pulido had not been prejudiced was an "objectively unreasonable application" of clearly established federal law. App. to Pet. for Cert. 64a. The District Court concluded that precedents of *Brecht* v. *Abrahamson,* 507 U. S. 619 (1993), and *O'Neal* v. *McAninch,* 513 U. S. 432 (1995), bound the court to grant habeas corpus relief because it could not be "reasonably certain" that the erroneous instruction did not have "substantial and injurious effect or influence in determining the jury's verdict." App. to Pet. for Cert. 65a-67a.

The Ninth Circuit affirmed in a *per curiam* decision. *Pulido* v. *Chrones*, 487 F. 3d 669, 670, 676 (CA9 2007). The Ninth Circuit relied on its decision in *Lara* v. *Ryan*, 455 F. 3d 1080 (CA9 2006), and not *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), for its harmless error standard. *Pulido*, *supra*, at 675-676. Instead of reviewing for "substantial and injurious effect or influence," the Ninth Circuit reasoned Pulido's conviction must be reversed because the court was not "absolutely certain" Pulido had been convicted under a valid legal theory. *Id.*, at 676.

This Court granted certiorari on February 25, 2008.

SUMMARY OF ARGUMENT

This is a simple case. *Brecht* v. *Abrahamson* established that the harmless error standard of *Kotteakos* v. *United States* applies on habeas corpus to all errors except "structural" errors. The error in this case was

a simple mistake on the elements of felony murder in an unusual situation where the correct answer was not established until the present case reached the state's highest court.

This case is not different in kind from any other case misdescribing or omitting an element of a crime, errors that this Court has classified as "trial errors" subject to harmless error analysis. All such errors could be shoehorned into an "erroneous legal theory" mold just as easily as the one in this case.

Applying *Brecht* to this case, the error was harmless. Pulido's testimony that he joined the robbery only after the killing and only under duress is contradicted by the physical evidence and his own statement in a recorded phone call. The jury's questions indicate they were an active, probing jury but do not indicate any confusion on the point of, or any acceptance of, Pulido's "late joiner" theory. The error had no "substantial and injurious" effect on the verdict.

ARGUMENT

I. In a habeas case, *Brecht* applies to all but a narrow class of "structural" errors, regardless of what standard may apply on direct review.

> "The *Kotteakos* [v. *United States*, 328 U. S. 750, 776 (1946)] harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* [v. *California*, 386 U. S. 18, 24 (1967)] standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." *Brecht* v. *Abrahamson*, 507 U. S. 619, 623 (1993).

For 15 years now, it has been clearly established that *Kotteakos* is the standard for reviewing errors for harmlessness in federal habeas corpus proceedings. If the error in question is appropriate for harmless error analysis at all, *i.e.*, "error of the trial type," *Kotteakos* is the standard. See *id.*, at 638.[4]

The only habeas cases to which the *Kotteakos* standard does not apply are the "structural" errors. See *id.*, at 629. This class of errors is very narrow. There is a second group of errors to which *Kotteakos* would apply in theory but for which a harmless analysis would be superfluous, because an element of harmfulness is built in to the definition of the error. See *Kyles* v. *Whitley*, 514 U. S. 419, 435 (1995) (*Brady*); *Fry* v. *Pliler*, 551 U. S. __, 127 S. Ct. 2321, 2330-2331, 168 L. Ed. 2d 16, 27 (2007) (Breyer, J., concurring in part and dissenting in part).[5] *Amicus* CJLF has previously described these two groups of errors as the "error is never harmless" group and the "harmless is never error" group. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Fry* v. *Pliler*, No. 06-5247, pp. 4-5.

The *Brecht* rule is one of several limitations that have been placed on collateral attacks on final judgments in order to limit this drastic remedy to the cases

---

4. *Brecht* does hedge an inch in a footnote regarding a hypothetical "deliberate and especially egregious error," *id.*, at 638, n. 9, but no such error was at issue in *Lara*, and none is at issue in the present case.

5. In *Calderon* v. *Coleman*, 525 U. S. 141 (1998) (*per curiam*), a narrowly divided Court held that a finding of error under the standard of *Boyde* v. *California*, 494 U. S. 370 (1990), did not resolve the *Brecht* question. No court in the present case has done a *Boyde* analysis, so this case is not an occasion to reconsider *Coleman*.

where its most needed. Although Judge Friendly's proposal of limiting habeas to cases with a colorable claim of innocence has not been adopted, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 150 (1970), various limitations have restricted relief in categories of cases where an error is least likely to have resulted in the conviction of an innocent person.

First, *Stone* v. *Powell*, 428 U. S. 465 (1976), eliminated second-guessing on habeas of Fourth Amendment exclusionary rule claims considered in state court, a remedy almost exclusively for the guilty. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), restricted, with exceptions, petitioners' ability to raise on federal habeas new claims so tangential to the main issues that competent counsel did not see fit to raise them at trial or on appeal. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), restricted retroactive application of newly created rules of procedure. Congress limited the grant of habeas relief in cases where the federal question is subject to disagreement among reasonable jurists. See 28 U. S. C. § 2254(d). *Brecht* was part of this movement. See 507 U. S., at 634-636. Cases where the effect of the error is less than "substantial and injurious" are cases where the chance of the defendant being actually innocent is remote.

In *Lara* v. *Ryan*, 455 F. 3d 1080 (CA9 2006), the Ninth Circuit invented a new breed of harmless error analysis. This class of errors does not result in automatic reversal regardless of whether it caused any harm, as true structural errors do. See *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984) (*Faretta* error). Instead, reversal may be avoided only on a showing of absolute certainty of no harm. See *Lara*, *supra*, at 1085. The standard was distilled from language in *Sandstrom* v. *Montana*, 442 U. S. 510, 526 (1979), *Zant*

v. *Stephens*, 462 U. S. 862, 881 (1983), *Yates* v. *United States*, 354 U. S. 298, 312 (1957), and *Stromberg* v. *California*, 283 U. S. 359, 368 (1931). Conspicuous by its absence from the *Lara* opinion is *any mention* of the controlling precedent on habeas harmless error analysis—*Brecht*.

Brecht unambiguously held that the harmless error standard used in direct review cases would no longer be applied on habeas corpus, and it discussed the habeas/direct distinction at some length. See 507 U. S., at 630-638. To see a federal court of appeals 13 years later blithely applying direct review precedents (*Sandstrom*, *Yates*, and *Stromberg*) in a habeas case with no mention of *Brecht* is remarkable, to put it mildly. In the present case, the Court of Appeals mentioned the controlling *Brecht* standard once in the beginning of the opinion, *Pulido* v. *Chrones*, 487 F. 3d 669, 673, n. 3 (CA9 2007), and then never used it. Such cavalier treatment of a limitation on the habeas court's authority is unusual but regrettably not unprecedented. See, *e.g.*, *Price* v. *Vincent*, 538 U. S. 634, 639 (2003) (Court of Appeals recited AEDPA standard and then ignored it).

Under *Brecht*, the threshold question is whether the error in question fits into the very narrow category of "structural error" or the much broader category of "trial error." See 507 U. S., at 629-630. If the latter, habeas relief cannot be granted unless the error " 'had substantial and injurious effect or influence in determining the jury's verdict,' " *id.*, at 631 (quoting *Kotteakos*, 328 U. S., at 776), bearing in mind the *Kyles* caveat for some errors, the finding of error has already answered that question.

II. The error in the present case is an instruction omitting an element, an error of the trial type.

Carella v. *California*, 491 U. S. 263 (1989) (*per curiam*), was a "legally erroneous theory" case in the same strained sense as the present case. In that case, the jury was instructed that intent to steal a rented vehicle could be presumed from failure to return it 20 days after written demand and that embezzlement could be presumed from failure to return it 5 days after the end of the rental period. See *id.*, at 264. Taking the first presumption, the jury could return a verdict of guilty if it found the required intent had been proved beyond a reasonable doubt or if it found that mere failure to return the car after the notice period had been so proved. See *id.*, at 266. The latter was a legally erroneous theory because such presumptions are no longer allowed after *Sandstrom* v. *Montana*, 442 U. S. 510 (1979).

The opinion of the Court held that this error was subject to harmless error analysis, and, by citing *Rose* v. *Clark*, 478 U. S. 570 (1986), without elaboration, implied that the analysis was the same as any other harmless error case. See *Carella*, 491 U. S., at 266-267. Justice Scalia, concurring in the result, took issue with that implication and argued for a different analysis. See *id.*, at 267.

After *Carella*, *California* v. *Roy*, 519 U. S. 2 (1996) (*per curiam*), confirmed that omission of an element was subject to standard *Brecht* analysis. See *id.*, at 4-5. *Roy* is remarkably similar to the present case. *Roy* also involved the California felony-murder rule, and it also involved an ambiguity subsequently clarified by the California Supreme Court. See *id.*, at 3. Roy's jury had been instructed that it was sufficient for conviction as an aider and abettor if Roy helped the perpetrator and

knew of his purpose. A later case held that the accomplice must also share the main perpetrator's criminal intent. See *ibid.*

The state appellate court and the Federal District Court both found the error harmless, the latter holding that "no rational juror could have found that Roy knew the confederate's purpose and helped him but also found that Roy did not *intend* to help him." *Ibid.* (emphasis in original). The Ninth Circuit reversed, and, as in the present case, it crafted a "special 'harmless error' standard," *id.*, at 4, distilled from *Carella* and *O'Neal* v. *McAninch*, 513 U. S. 432 (1995). This was error. Although the special standard was "certainly consistent with the concurring opinion in *Carella*," *Roy*, 519 U. S., at 5-6, that opinion is not the law. *Brecht*, as explained in *O'Neal*, is *the* standard for harmlessness of "trial error" on habeas. See *id.*, at 6.

Roy could be shoehorned into the "erroneous legal theory" model just as easily as the present case. On the face of the instruction, the jury could have convicted Roy on the erroneous theory that assistance plus knowledge of purpose equals aiding and abetting. The District Court correctly found the error harmless, though, upon evaluating the evidence and finding that no rational juror would have adopted that view of the case. See *id.*, at 3.

Finally, *Neder* v. *United States*, 527 U. S. 1 (1999), rejects the notion of a special harmlessness standard for cases of this type. Neder was accused of filing a false tax return, among other offenses. "To obtain a conviction . . . , the Government must prove that the defendant filed a tax return 'which he does not believe to be true and correct as to every material matter.' 26 U. S. C. § 7206(1)." *Id.*, at 16. Materiality is an element, along with falsity and mental state, and the failure to instruct the jury on that element was error.

See *id.*, at 8. However, it was trial error, subject to harmless error analysis under the same standard as other trial errors. See *id.*, at 15.

Neder's jury was presented with a legally impermissible theory in the same sense that the jury in the present case was. The jury could return a verdict of guilty if it was proved that Neder had knowingly filed a return that was false as to a material matter, a legally correct theory, or as to an immaterial matter, a legally erroneous theory. Filing a return that is false on an immaterial matter is not a crime, just as joining a robbery in which someone has already been killed is not felony murder in California. The error was harmless in *Neder* because five million dollars is so obviously material that sending the case back for retrial would be pointless. See *id.*, at 15-17.

Neder considered and rejected the argument that there is a special harmlessness analysis for omitted elements gleaned from the plurality opinion in *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), the *Carella* concurrence, and language in *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993). See *Neder*, 527 U. S., at 13-14. The Court rejected the proffered distinction between omission of an element and misdescription of an element, noting that a given instruction could frequently be characterized either way. See *id.*, at 14 (quoting *Roy*). The error in *Roy* could be considered an error of misdescribing the mental element or omitting the intent element. The error in the present case could be considered one of misdescribing the timing element or omitting the contemporaneity element. *Washington* v. *Recuenco*, 548 U. S. 212 (2006), confirms that omission of an element is not structural error, applying *Neder* to a case where a sentencing factor equivalent to an element was not submitted to the jury. See *id.*, at 220-222.

The purported distinction between erroneous legal theories and other instructional errors is equally malleable. As discussed above, *Carella*, *Roy*, and *Neder* could also be shaped into erroneous alternate legal theory cases with minimal effort. It is bad enough that routine questions of state law such as *Roy* and the present case are escalated to federal questions at all,[6] but to further exempt them from standard harmless error analysis based on a vague and flimsy distinction such as the one made in the present case is particularly intrusive into the operation of state criminal law.

The rule should be simple. A very small class of structural errors are never harmless. For everything else, including the present case, *Brecht* is the standard for harmless error on habeas corpus.

III. Applying *Brecht* to this case, the error is harmless.

A. The Harmless Error Standard.

> "If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, *after pondering all that happened without stripping the erroneous action from the whole*, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected

---

6. *Amicus* believes that under the *Boyde* standard there is no federal constitutional error in this case, but the State did not seek review on that point.

> by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States*, 328 U. S. 750, 764-765 (1946) (emphasis added).

As further clarified in *O'Neal* v. *McAninch*, 513 U. S. 432, 435 (1995), the reviewing court should assign the effect of the error to one of three categories. Either it had a substantial effect, it did not, or there is "grave doubt" whether it did. The latter "mean[s] that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." The third category "is unusual." *Ibid.* In the present case, when we ponder all that happened, we see no realistic possibility that the jury gave any credence to the defendant's "late joiner" theory. Therefore, the erroneous instruction that might, in theory, have permitted conviction under that theory had no substantial effect in this case.

B. Pulido's Trial.

The jury found Michael Pulido guilty of robbery, Cal. Penal Code § 211, and first-degree murder. Cal. Penal Code §§ 187, 189; see J. A. 55, 57. As part of Pulido's penalty enhancement, the jury found the special circumstance of murder in the course of a robbery. J. A. 56. Pulido's murder conviction was based on his role as a principal in the underlying robbery. *People* v. *Pulido*, 52 Cal. Rptr. 2d 373, 377 (Ct. App. 1996). The prosecution's theory of the case was that Pulido either acted alone, and was both the killer and the robber, or aided and abetted Aragon, knowing full well that Aragon intended to rob the Shell station. *Ibid.*; see also App. to Pet. for Cert. 38a. Pulido's defense was that he had been a "late joiner" to the robbery, and that Aragon acted alone in the robbery and the killing, and Pulido

had been coerced into opening the cash register. *Pulido*, *supra*, at 377. Pulido argued that he could only be convicted as an accessory after the fact with respect to the robbery. *Ibid.*; App. to Pet. for Cert. 38a.

The jury was instructed on murder, J. A. 8-9, first-degree felony murder, J. A. 10, aider-abettor liability for murder, J. A. 11, robbery, J. A. 19-20, aider-abettor liability for robbery, J. A. 21-25, and felony-murder liability while a robbery was still in progress. J. A. 26. The jury also received instructions on the "special circumstances" that could enhance Pulido's penalty for a murder that occurred during the commission of a robbery, J. A. 12-18, and received instructions on special allegations of personal use of a firearm, J. A. 27-28, and personal, intentional infliction of great bodily harm. J. A. 29-30. The jury did not receive an instruction that "a felony murder verdict could be based on an aiding and abetting theory only if [defendant] aided and abetted the robbery before the infliction of the fatal wound" for the simple reason that Pulido did not request such an instruction. See *People* v. *Pulido*, 15 Cal. 4th 713, 726, 936 P. 2d 1235, 1243 (1997). After Pulido was convicted, however, the absence of this instruction was the basis of his direct appeal. *Ibid.*

California law on when the trial court has a duty to instruct *sua sponte*, allowing the issue to be raised on appeal despite absence of a request, was less than clear at the time of the direct appeal. See generally 5 B. Witkin & N. Epstein, California Criminal Law, Criminal Trial § 610, p. 869 (3d ed. 2000). The California Supreme Court chose to resolve the case on harmless error rather than resolve this thorny procedural

default question. See *Pulido*, 15 Cal. 4th, at 726, 936 P. 2d, at 1243.[7]

The California Supreme Court found the error in the murder instruction was harmless because another properly given instruction had resolved the issue. *Ibid.* The omitted instruction was not prejudicial because the jury had been "instructed that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery *at the time of the killing*." *Id.*, at 726-727, 936 P. 2d, at 1243 (emphasis in original). The California Supreme Court reasoned the special-circumstance instruction and finding demonstrated the jury did not accept Pulido's defense that he had joined the robbery only after Flores was killed. *Id.*, at 727, 936 P. 2d, at 1244.

The Ninth Circuit found the California Supreme Court's reliance on the special-circumstance instruction to be in error. *Pulido v. Chrones*, 487 F. 3d 669, 673-674 (CA9 2007). It held that the trial court's error of substituting an "or" for an "and" had "erroneously enlarg[ed] the scope of activity that would qualify as murder-robbery under the special circumstance." *Id.*, at 674. This subtle flaw was sufficient to make the Ninth Circuit believe that the jury could have found the special circumstance to be true without finding Pulido had been involved in the robbery when Flores was killed. *Id.*, at 675. The Ninth Circuit reasoned when the jury could have based its special-circumstance finding on the theory that "the murder was committed 'in order to carry out or advance' the robbery," the

---

7. The California Supreme Court subsequently clarified that the trial court has no duty to instruct *sua sponte* on doctrines of law not well established at the time of trial. See *People* v. *Michaels*, 28 Cal. 4th 486, 529, 49 P. 3d 1032, 1058 (2002). Under current law, Pulido's claim would be defaulted.

California's Supreme Court's determination that the jury had convicted Pulido on a valid legal theory "does not follow." *Ibid.*

The flaw in the special-circumstance instruction went unnoticed by anyone at trial. See J. A. 33-57. Neither the trial court judge nor the jury questioned the instruction. *Ibid.* Furthermore, the error went unrecognized by the state courts on direct appeal. See *Pulido*, 15 Cal. 4th, at 726-727, 936 P. 2d, at 1243-1244. It was not until the case reached the Federal District Court that the error received attention. App. to Pet. for Cert. 51a.

The likelihood that the jury noticed and relied on a flaw that no one else noticed through the trial and appeal is remote on its face. It becomes even more remote when "pondering all that happened" in light of the evidence in the case.

Pulido's convictions for first-degree felony murder and robbery are supported by strong evidence establishing Pulido's guilt. Given that both Pulido and Aragon are dubious characters, see 15 Cal. 4th, at 717-719, 936 P. 2d, at 1237-1238, it is likely the jury relied on the other evidence. See *id.*, at 717, 936 P. 2d, at 1237-1238. The prosecution presented substantial physical evidence linking Pulido to both the robbery and the scene of the murder. *Ibid.* Pulido's fingerprints were on both the cash register taken from the Shell station and on an unopened can of Coke on the store counter. *Ibid.* Meanwhile, Aragon's fingerprints were not found at the scene of the murder nor on the register. *Ibid.* This physical evidence alone is sufficient to negate any "grave doubt" that the jury's findings of guilt were based on incorrect instructions. See *O'Neal*, 513 U. S., at 435-436. But this is not all the evidence that supported the prosecution's theory that Pulido intended to participate in the robbery. See *Pulido*, 15 Cal. 4th, at

717-718, 936 P. 2d, at 1237. The jury heard evidence that Pulido had been seen in possession of a .45-caliber pistol, the same type of gun used to murder Flores. *Ibid.* Pulido had even volunteered information regarding the murder-robbery before being charged for the offense and had voluntarily led police to the location where .45 caliber cartridges bearing ejection marks similar to those found at the Shell station were found. *Ibid.*

In contrast, there is little evidence supporting Pulido's innocence. First, Pulido offered his own testimony blaming Aragon for the murder. *Id.*, at 718, 936 P. 2d, at 1237-1238. This is a self-serving statement unlikely to be given much weight, particularly in light of Pulido's multiple lies blaming a variety of other people and his admission in the recorded phone call from jail. See *id.*, at 717, 936 P. 2d, at 1237. There is also no physical evidence supporting Pulido's account since Aragon's fingerprints are missing from the scene of the murder, the cash register, and the murder weapon. See *ibid.* The only other evidence supporting Pulido's defense is the testimony of a neighbor, who believes that in the early morning of the murder he heard a loud bang and a voice yelling, as if a person was addressing someone else. *Ibid.* This evidence supports only the proposition that two people were involved and says nothing about either person's role in the crime.

With no reliable, living witnesses to the actual robbery and killing, the physical evidence assumes great importance. The damning piece of evidence that cannot be reconciled with Pulido's version of events is his fingerprints on the Coke can. His explanation that he might have touched the can on some earlier, unspecified occasion, *id.*, at 718, 936 P. 2d, at 1238, is preposterous. It is a matter of common knowledge that soft drinks are fast-moving items in convenience stores' inventories,

and everyone knows that Coke is a top brand. It is highly unlikely that a can he had touched on a prior occasion, when it would have been toward the front of the shelf, would still be there even a day later.

C. The Jury's Questions.

The jury's questions during deliberations demonstrate that the jury was not confused as to whether Pulido had intended to participate in the robbery before the killing. Instead, the jury's questions demonstrate that the jury was wrestling with the question of whether it could convict Pulido if it believed Pulido's only involvement was aiding Aragon's plan to commit the robbery. If the jury believed Pulido's story that he had "engaged in or was an accomplice in" robbery under duress from Aragon after the murder occurred, the jury would not have found Pulido was "engaged in or an accomplice in the commission of or attempted commission of robbery during the commission of the crime charged in Count 1 [murder]." See J. A. 56; *Pulido*, 15 Cal. 4th, at 727, 936 P. 2d, at 1243.

The first question the jury asked was whether a conclusion of aiding and abetting a robbery was equivalent to finding the defendant guilty of robbery. J. A. 33. The trial judge's response referred the jury back to CALJIC 3.01. J. A. 34. CALJIC 3.01 instructed that "mere presence at the scene of the crime" and "knowledge a crime is being committed" were insufficient to convict Pulido as an accomplice. Intent is also required. J. A. 35. This instruction, the jury's conclusion Pulido was guilty of robbery, and prosecution's theories that Pulido had either acted alone, or had aided Aragon with knowledge of Aragon's intent to commit the robbery, work together to dispel any "doubt" as to whether the jury rejected Pulido's story of events. If the jury had believed Pulido's story that he was waiting outside the

Shell station, and had been forced into opening the cash register, it would not have convicted Pulido for robbery, because the required intent would have been missing.

The jury's question on the felony-murder instruction, CALJIC 8.27, supports this conclusion. See J. A. 36-38. The difference between the two felony-murder definitions offered by the jury relate to whether the jury could convict solely because he "facilitated by aiding" or whether the jury could convict because it found he both intended the robbery and somehow aided in the robbery. J. A. 37-38. Conspicuously absent is any question about the time of joining the robbery. The jury seemed to be grappling with the harshness of the standard felony-murder rule as applied to minor accomplices. This is the same problem that led to a prohibition of capital punishment for such accomplices in *Enmund* v. *Florida*, 458 U. S. 782 (1982). There is no indication from this question the jury was concerned with the exotic "late joiner" problem.

The only question that relates to timing is the one at J. A. 41. Here the jury asked whether knowledge of the perpetrator's purpose must precede the crime. That is, if Aragon committed the robbery and Pulido assisted, did Pulido need to know Aragon was going to rob the store before he actually did? This is not the same timing problem as the "late joiner" theory. The fact that the jury asked about this issue and not the "late joiner" issue tends to indicate they were not concerned with the latter, consistent with the state of the evidence contradicting that theory.

The jury's questions and verdicts indicate the jury found guilt and the special circumstance to be true because Pulido intended to participate in the robbery, but they could not agree whether he intended to kill Flores or personally acted as the triggerman. This is confirmed by the fact that the jury deadlocked on the

special allegations of personal use of a firearm and personal infliction of great bodily harm. *Pulido*, 487 F. 3d, at 672. Furthermore, if the jury had any question as to whether the special circumstance could be true if Pulido had merely facilitated the robbery by taking the cash register away from the scene of the crime, the jury would have asked. A jury that draws diagrams to demonstrate its confusion on a legal theory, asks at least nine probative questions during deliberations, takes three days to deliberate, and has been instructed that it cannot return convictions unless they are unanimous is not the type of jury that would unquestioningly interpret an ambiguous instruction to require such a harsh result. See J. A. 33-54. If the jury really had bought into Pulido's defense—that he had been coerced into opening the cash register by Aragon after the killing—the jury would not have found the special circumstance to be true without asking for clarification. The contradiction between that version of the facts and the word "during" in the verdict form, see J. A. 56, would have prompted a question from this inquisitive jury.

The jury's questions support the conclusion of the California Supreme Court. The questions demonstrate the jury was carefully considering and probing all the evidence before it—including the physical evidence—when it made its decision. The typographical error recognized by the District Court and the Ninth Circuit is insufficient to undermine this proactive and curious jury's conclusions. The typographical error does not create "grave doubt" as to whether the "error had a substantial and injurious effect on the jury's verdict." The error in this case had no such effect.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

May, 2008

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation